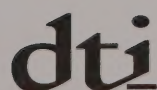


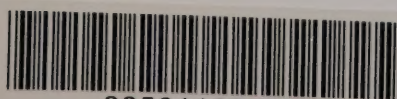
PROMOTING ELECTRONIC COMMERCE

**Consultation on Draft Legislation and
the Government's Response to the Trade and Industry
Committee's Report**



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*Presented to Parliament by the
Secretary of State for Trade and Industry
by Command of Her Majesty
July 1999*

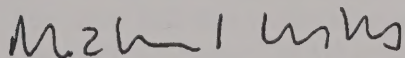
FOREWORD

In the last six months, this Government has been moving vigorously ahead to make Britain the best place in the world to do business electronically. This Paper sets out the Government's response to the Report from the House of Commons Trade and Industry Committee on our legislative proposals and contains the draft of the Electronic Communications Bill itself. I do hope you will take the opportunity to read and comment on the draft Bill before we introduce it into Parliament.

The Bill is one of a series of measures we have taken since January to accelerate the adoption of electronic commerce in the United Kingdom. These include licensing new radio spectrum for broadband wireless services; opening up BT's local network for broadband services; the introduction of the third generation of mobile phones, giving mobile access to the Internet. These measures will enable us to lead the world in Broadband access.

The Electronic Communications Bill will help to create confidence in the use of electronic communications between businesses and their customers. It will create a legal framework for the use of electronic signatures so that people can be sure about the origin and integrity of communications. It will help to facilitate electronic government by removing legal obstacles so that people and businesses can, if they prefer, communicate with Government electronically rather than on paper. It allows trust to be placed in the providers of cryptography services by introducing a voluntary "approvals" scheme and it also helps prevent the Government's existing law enforcement powers being eroded through the criminal use of encryption; without requiring the storage of decryption keys with third parties. Finally, it simplifies the process under which existing Telecommunication Act licences can be amended.

The legislation we propose will play a positive and important role in the Information Age which is affecting all our lives.



Michael Wills MP
Parliamentary Under Secretary of State for
Small Firms, Trade and Industry

PROMOTING ELECTRONIC COMMERCE

Consultation on Draft Legislation and the Government's Response to the Trade and Industry Committee's Report

Part I The Consultation Document and the Government's
Response to the Trade and Industry Committee's
Report

Part II Explanatory Notes
The Draft Electronic Communications Bill

PART I

THE CONSULTATION DOCUMENT AND THE GOVERNMENT'S RESPONSE TO THE TRADE AND INDUSTRY COMMITTEE'S REPORT

Introduction

1. This Command Paper invites comment on the Government's proposals for an Electronic Communications Bill set out in Part II. It also sets out the Government's response to the recommendations contained in the Trade and Industry Committee's Report¹ on the Government's previous consultation document².
2. The Government welcomes the Committee's Report. It, and the other responses to the consultation document launched in March 1999, have contributed to the measures set out in the draft Bill.
3. The Committee restricted its report to the issues raised by that consultation document, and we have followed this approach in this document. The Government looks forward to the Committee's further report in which it intends to deal with broader issues concerning electronic commerce.

Recent Developments

4. Since the Government gave evidence to the Select Committee and the publication of the Committee's Report there have been a number of developments, which the Government would like to highlight:
 - a) The Government received 252 responses to its *Building Confidence in Electronic Commerce* consultation document. The DTI has separately published a summary³, by independent consultants, of the responses to the consultation.
 - b) The Government is now consulting on the draft Electronic Communications Bill. The draft Bill takes into account the responses to the consultation process, the Select Committee's Report and discussions with interested parties over the last few months. It forms a key part of the Government's strategy for making the UK the best place in the world to do electronic business, by starting the process of modernising the law and creating a climate in which electronic business can be conducted with confidence.
 - c) In parallel with the previous consultation the Prime Minister asked the Cabinet Office Performance and Innovation Unit (PIU) to consider encryption, e-commerce and law enforcement. A task force was established and a Report⁴ outlining their main findings was published on 26 May. As a result of this report, the Government has confirmed that there will be no mandatory link between key escrow and the approvals system introduced by the Electronic Communications Bill.
 - d) The Government has decided not to introduce, in legislation, a rebuttable presumption of legal recognition for electronic signatures. Instead, the Government proposes to make it clear that all types of electronic signatures will be legally admissible in Court.

¹ www.parliament.uk/commons/selcom/t&ihome.html

² www.dti.gov.uk/cii/elec/elec_com.html

³ The summary is available at www.dti.gov.uk/cii/elec/conrep.htm

Copies of the responses themselves are available for viewing by appointment at the DTI Library, Lower Ground Floor, 1 Victoria Street, London SW1H 0ET. Please telephone William LeSadd on 020 7215 6699 for further details. Some respondents have also made their contributions available electronically on the world wide web.

⁴ www.cabinet-office.gov.uk/innovation/1999/encryption/index.html

e) The Government has decided that the liability of Trust Service Providers (TSPs), both to their customers and to parties relying on their certificates, is best left to existing law and to providers' and customers' contractual arrangements.

f) The Government sees the availability of high-quality cryptographic services as an important building block to meeting its goal of building confidence in electronic commerce. The previous consultation document set out the intention to introduce a statutory, but voluntary, licensing scheme for Trust Service Providers. Given the Government's decision not to offer statutory privileges as an incentive for the statutory scheme, and its voluntary nature, the Government has decided that the scheme is best described as an "approvals regime". The Government believes that a voluntary approvals scheme will provide customers with an assurance of high standards and a means of redress when things go wrong.

g) The Government's earlier consultation paper also sought views on whether it should take any measures to regulate unsolicited email ("spam"). The majority opinion was to allow the industry to take effective voluntary measures, but that the Government should keep a watching brief and be ready to take legislative action if necessary. The Government has decided to follow this approach and work with industry and rely on existing measures. The EU Distance Selling Directive (97/7/EC) contains provisions requiring Member States to enable consumers to register their objection to receiving unsolicited emails sent for the purpose of distance selling, and to have their objections respected. The Directive does not apply to business-to-business transactions and certain contracts are excluded, including those related to financial services (subject of a separate EU proposal). The Directive has to be implemented by 4 June 2000, and DTI plan to consult on its implementation later in the summer.

h) The Government also sought views on whether it should introduce any other legislative measures to promote electronic commerce. It has decided not to do so in this draft Bill. However, the Government looks forward to any further suggestions that may arise in response to this consultation, in the Performance and Innovation Unit's broader e-commerce study and in the Committee's next report.

Consultation

5. We invite comments by **Friday 8 October**. It may not be possible to take into account responses received after this. Any comments should be sent in writing to Stephen de Souza either by electronic mail (preferably in Word 6.0 or text format) to:

X.400 address: S=ecbill O=DTI OU1=CIID P=HMG DTI
A=Gold 400 C=GB

internet address: ecbill@ciid.dti.gov.uk

or to:

Communications and Information Industries Directorate
Department of Trade and Industry
Room 220, 151 Buckingham Palace Road
London SW1W 9SS

It would be helpful if those responding could clearly state who they are and, where relevant, who they represent. Should you wish any part (or all) of your comments to be treated in confidence, you should make this clear in any electronic mail or papers you send. In the absence of such an instruction, submissions will be assumed to be open, and will be copied to the Trade and Industry Committee; they may also be shared with others or published by Ministers, or placed in the Libraries of the Houses of Parliament.

Response to the Trade and Industry Committee's Recommendations

Paragraph 7 The Government's proposals to facilitate trust in electronic commerce must not interfere with existing, and often long-standing, electronic commerce relationships.

6. The Government accepts this in full. The previous consultation document made it clear that the Government does not intend to interfere with existing commercial relationships. The Government recognises that many businesses, ranging from banks to manufacturers, have been successfully carrying out electronic business, usually in closed user groups, for many years. The Government believes that the increasing use of open networks, such as the internet, is making electronic business easier, cheaper and more accessible, bringing its benefits to wider markets, including consumers. The Government believes that the draft Bill will facilitate electronic commerce, including in existing relationships, by clarifying the legal admissibility of electronic signatures.

Paragraph 8 The Government's proposals are tied, perhaps unduly, to the creation of a regulatory regime based on one particular technology — public-key cryptography — and a specific market model, which, although they could be considered attractive at present, may not be optimal bases for electronic commerce carried out over the internet in the future.

7. The Government is committed to a technology neutral Bill. The draft Bill published today is intended to promote the provision of cryptography services and electronic commerce. Although many Trust Service Providers (TSPs) may well base their services on public key cryptography, there is no reason why other technologies (e.g. biometrics) could not be used by approved TSPs. The Government consulted on how alternative business models should fit into the approvals regime. Although there were few specific responses on this, the Government believes that varying business models will develop and that it is impossible to predict which are likely to succeed. The approvals regime needs to be flexible and responsive enough to accommodate this, which is why the draft Bill leaves the detail of the statutory regime to secondary legislation.

Paragraph 25 In order to help the UK become the best environment in which to trade electronically by 2002, the Government should keep a close eye on international electronic commerce policy developments and adopt best practice from elsewhere when appropriate.

8. Electronic commerce is inherently global and the Government takes this into account in formulating policy, and recognised this in drawing up the previous consultation document. The international picture is complex. Our approach is based on trying to move quickly where there is reasonable international consensus, but not striking out unilaterally against the current of global e-commerce.

9. A good example of the above is the leading role the UK has taken in both EU and OECD discussions on cryptography. On the former the DTI helped ensure a compromise was reached which balanced the important security requirements relating to the generation of electronic signatures with the need to encourage an open and flexible market. In the OECD the DTI is working to establish a framework which recognises the importance of global compatibility between national and regional initiatives on authentication. The UK is one of the key players in forming the international agenda, particularly within Europe and has developed models such as for dealing with illegal content on the internet that have been adopted around the world.

10. The draft Bill is an important part of the Government's policy to create in the UK the best environment worldwide in which to trade electronically by 2002. Overall the draft Bill builds on the draft EU Electronic Signatures Directive, is consistent with the 1997 OECD Cryptography Guidelines and goes some way towards implementing the provisions (e.g. Article 5) of the UNCITRAL Model Law on Electronic Commerce.

Paragraph 34 Notwithstanding legitimate reasons for delay, we are concerned at the time it has taken the present Government to establish and implement a cryptography policy. It is our perception that inadequate political control has been exercised over the development and determination of cryptography policy. The policy agenda has been allowed to drift for too long. It is imperative that Ministers take a firm grip of the issues from now on.

11. The speed of computers doubles every 18 months. Recent years have seen an explosive growth in the numbers of people connected to the internet, allowing complex data to be exchanged almost instantaneously over thousands of miles. This phenomenon is having a significant economic impact and will impact on society itself, often in unpredictable ways. The Government needs to take account of the interests of society as a whole; policy on electronic commerce needs to take account of broader issues, such as privacy and law enforcement. Against this background, Governments around the world have tried to formulate policies which capture the benefits and mitigate the potential downside. No Government has found it easy either to formulate or implement policy in this area.

12. Nevertheless, the Government has not been slow to rise to the challenge. The UK has played a leading role in the debate. The UK was the first country in Europe to recognise the need to deal with both authentication and confidentiality issues in a single framework, because the same technology underpins both kinds of service. Policy on cryptography and e-commerce more broadly has been driven at the highest levels politically. The Government rejects the Committee's suggestion that inadequate political control has been exercised over the development and determination of cryptographic policy:

- The Government's cryptography policy was launched within a year of the General Election by Mrs Barbara Roche MP in April 1998 when she announced the Government's intention to pursue a more liberal policy than the previous administration, by rejecting the mandatory nature of the scheme which they had consulted on shortly before the General Election.
- The former Secretary of State for Trade and Industry (Peter Mandelson MP) set the target for the UK to be the best environment worldwide in which to trade electronically by 2002 in the White Paper — *Our Competitive Future: Building the Knowledge Driven Economy*.
- On 5 March 1999 the Secretary of State for Trade and Industry and the Home Secretary jointly launched *Building Confidence in Electronic Commerce*. In parallel with the consultation, the Prime Minister personally launched a partnership with industry to find solutions to the problems posed by encryption for law enforcement.

Paragraph 36 We believe it is essential that every measure included in the forthcoming Electronic Commerce Bill is designed to facilitate rather than restrict electronic commerce and that this should be the criterion by which Parliament judges the Bill.

Paragraph 117 Now that key escrow has been dropped by the Government, the rationale for an electronic commerce bill is open to question. We recommend that the Government think twice about the content of its forthcoming Electronic Commerce Bill and only include in the Bill measures which will promote electronic commerce, rather than measures discarded from the previous key escrow policy which are concerned with controlling, not facilitating, electronic commerce.

13. The Bill will be an essential enabling measure to spur on the growth of e-commerce in the UK. The Bill will support the Government's targets for:

- the UK to be the best environment for electronic business by 2002;
- 25% of Government services to be available electronically by 2002 (rising to 100% by 2008); and
- 90% of routine procurement of goods to be done electronically by 2001.

14. The draft Bill is designed to promote e-commerce in a number of ways:

- through clarifying the status of electronic signatures;
- by removing legal barriers so that the option of communicating electronically can be offered instead of the use of paper; and
- by building confidence in the provision of cryptography services.

The draft Bill also contains measures designed to ensure that the effectiveness of existing law enforcement powers is not undermined by the criminal use of the very technologies (such as encryption) which the Bill seeks to promote.

Paragraph 37 While, we accept the Government's judgement that legislation should not be delayed still further solely to allow for a standard consultation period, especially as the issues on which DTI sought views were so familiar to likely respondents, the time constraints cited by DTI have been entirely of their own making.

15. The Government has sought to maintain a balance between allowing an adequate period for consultation, and pressing ahead with drawing up legislation. As the Committee recognises, the issues on which the Government sought views were familiar to many respondents. The Government was impressed by both the number⁵ and the quality of the responses. Moreover Ministers and officials consulted many companies and others in drawing up the previous consultation document. This document is the next step in an ongoing process of consultation. The DTI will continue consulting as the Bill is taken through parliament and will undertake future formal consultation as the Bill is implemented. The Government is committed to building confidence in e-commerce, building the legal framework in partnership with industry and other interested parties.

Paragraph 40 We consider it a potentially serious omission that DTI has not indicated how its proposals for electronic signatures would affect Scottish law and we recommend that they quickly do so.

16. The Government has always recognised that the implementation of the policy of the Bill is likely to require amendment also of basic provisions of Scots private law relating to requirements of writing, evidence and contract formation. In that regard, it is envisaged in the draft Bill that Scottish Ministers will have the power to make any necessary amendment of Scots law on matters of that kind, by means of subordinate legislation taken through the Scottish Parliament, subject to the consent of UK Ministers as the power will extend to legislating on reserved matters.

⁵ The DTI received 252 responses in total (of which 246 were received in time to be taken account by the consultants for their summary).

17. As in the case of England and Wales, the legislation will present the opportunity to provide a clear basis in law for the operation of electronic commerce. The powers in the draft Bill should enable this policy to be implemented in a consistent way throughout the UK, but also by means which ensure that this is achieved in the most appropriate way for each jurisdiction.

Paragraph 41 Although electronic signatures are not currently without legal standing, legislation to clarify their status would command widespread support.

Paragraph 44 One objection to the Government's proposals for the recognition of electronic signatures is that they are better suited to a civil law jurisdiction, than to the English common law tradition.

Paragraph 46 A second objection to the proposal that some electronic signatures will carry a rebuttable presumption of validity is that this would reverse the burden of proof in contractual disputes, potentially undermining confidence in electronic commerce if means of forging electronic signatures are developed.

Paragraph 51 We recommend that the Government lay before Parliament the justification for such a radical change to the way signatures are considered by English law and explain in greater detail than hitherto whether or not the EU Electronic Signatures Directive genuinely necessitates such a change to be made.

18. The Government welcomes the Committee's support for its intentions to reduce the present uncertainty over the legal admissibility of electronic signatures. The means of reducing this uncertainty has provoked considerable debate and the draft Bill sets out what the Government believes is a prudent approach. As the Committee recognises, the common law treats signatures in terms of their purpose (did the signatory intend to indicate their assent to what was in the document?), rather than their form (does the signature meet certain requirements?).

19. This means that in many, but not all, circumstances the law is flexible enough to be capable of accommodating electronic signatures. However there will be uncertainty, until sufficient case law has built up. This could take some years. The responses to the consultation launched by the previous administration indicated considerable support for a rebuttable presumption that an electronic signature was what it claimed to be. However, many of the respondents to the recent consultation argued against introducing such a presumption because:

- they argued that the burden of proof would be shifted, to consumers for example, to prove that they had not signed a document, thus reversing the position in existing law;
- the technology, and its likely use in most situations, is not sufficiently developed to be able to set the necessary standards;
- moreover, even if the technology were robust, it is hard to control how people use it (e.g. although a properly implemented electronic signature cannot be forged, a smart card can easily be lost or not properly protected);
- the flexibility of common law, which makes English Law the jurisdiction of choice for many international transactions, might be compromised by such a measure.

20. The Government has therefore decided not to create a rebuttable presumption for the validity of any types of electronic signature. However, Clause 7 of the draft Bill makes it clear that all types of electronic signatures, whether facilitated by “approved” providers or not, and irrespective of the jurisdiction where they were issued, will be legally admissible in Court. This is sufficient to implement the current provisions regarding electronic signatures in the draft Directive.

Paragraph 58 The outdated definitions of words such as “writing” and “signature” in law are potentially significant barriers to the development of electronic commerce in this country. DTI seems not to appreciate the need for swift legislative action in this area and would appear to have made limited progress since 1997. We favour the Government taking powers in the forthcoming Electronic Commerce Bill for secondary legislation to update definitions of words in law to take account of new information and communication technologies and drawing on the approach of the Australian draft Electronic Transactions Bill 1999. We recommend that the Government quickly publish an analysis of legal changes required, both in relation to English and Scots law and identify those transactions and official proceedings which it believes should not be allowed to be conducted electronically.

21. The Government welcomes the Committee’s support for its view that certain requirements of form (e.g. for information to be in writing or signed) in legislation drawn up before the advent of electronic commerce are potentially significant barriers to its development. The Bill will be the first available legislative opportunity to address this broadly, though the Finance Bill addresses matters concerning the Inland Revenue and HM Customs and Excise. The draft Electronic Communications Bill includes a power in Clause 8 to enable Ministers to draw up secondary legislation to permit such requirements to be met electronically. For example, the DTI plans to use powers under the Bill to amend the Companies Act 1985 to enable companies to communicate with shareholders electronically.

22. There may be a few examples where it is not appropriate to take such a step, at least in the near future. The publication of an analysis of the references in legislation to “in writing” or “signed” is not compatible with the timetable for bringing the Bill before Parliament. The Society for Computers and Law has estimated that there may be as many as 40,000 references to “writing” and “signature” alone.

Paragraph 64 We acknowledge the need for some form of accreditation scheme relating to TSPs to persuade firms and individuals “standing on the edge of the e-commerce lake wondering whether it is really safe to dive in” that electronic commerce is as safe and reliable as traditional forms of commerce.

Paragraph 65 We recommend that the Government sponsor a voluntary accreditation scheme for TSPs which is based on the needs of users and service providers but which is not grounded in legislation. We think it prudent that the Government take powers to establish a statutory-backed scheme but recommend that these powers are held in reserve unused unless and until it is demonstrated that a voluntary scheme fails to protect the interests of all consumers and service providers.

23. The Government welcomes the Committee’s support for the principle of a voluntary approvals scheme. The previous consultation document set out the intention to introduce a statutory, but voluntary, licensing scheme for Trust Service Providers. Given the Government’s decisions not to offer statutory privileges as an incentive for the

statutory scheme, and its voluntary nature, the Government has decided that the scheme is best described as an “approvals regime”. The Government believes that an approvals scheme will provide customers with an assurance of high standards and a means of redress when things go wrong. It also believes that these standards should not be set in stone because the market is moving so quickly and there is no agreement on what commercial models are likely to succeed. Heavy-handed regulation would risk stifling innovation and growth.

24. Many respondents to the recent consultation argued for a “light touch” in any legislation or regulation. One noticeable shift in opinion from the consultation launched by the previous administration was that voluntary statutory licensing was questioned. There were many calls for the market and the technology to be allowed to evolve, and some for the industry to be allowed to develop self-regulatory or guidance mechanisms.

25. The choice between a statutory voluntary regime, or a suitable self-regulatory regime, is finely balanced. The Government is in close dialogue with the Alliance for Electronic Business in relation to its work in developing a non-statutory, self-regulatory scheme. The Government therefore proposes, in Part I of the draft Bill, to take powers to set up a statutory voluntary scheme by secondary legislation. After Royal Assent, the Government will need to decide whether to bring such a statutory scheme into being, or to follow the recommendation of the Trade and Industry Committee and hold the powers in reserve, relying on self regulation. Our assessment will take account of the robustness, industry acceptance and quality of the self-regulatory scheme which by then should have emerged from industry and make a judgement about how its merits would compare with those of a statutory scheme. We will consult on that decision.

Paragraph 66 We see no reason why existing means of distinguishing licensed or accredited services from unlicensed or non-accredited services cannot be applied successfully to TSPs.

26. The Government agrees with the Committee. The essential points are that approval should apply to a particular service, or range of services, rather than the provider and that there should be a clear distinction between approved and unapproved services. It is likely that service providers would be allowed to use a logo (or some other mark of recognition) in connection with those Cryptography services for which they had been approved.

Paragraph 67 There is a danger that TSPs and their customers will be confused by the multi-layered design of the proposed statutory licensing regime. We would welcome early clarification by DTI and OFTEL of how the proposed licensing regime will work in practice, were it to be introduced.

Paragraph 70 We recommend that, if DTI intends to establish a statutory licensing scheme, it spell out which licensing functions it would be prepared to delegate to an industry body in future and which it would prefer a public sector body to perform; and that it set out the criteria an industry body must meet in order for it to be considered as the licensing authority for TSPs.

27. The Government does not believe that it is sensible, given the pace at which this market is developing and its present immaturity, to spell out now the exact division of functions between a statutory body and industry. The Government believes that the objectives of the scheme as a whole are far more important than the exact division of responsibilities.

28. The Government believes that any scheme should have the following characteristics:

1. The scheme should be wide enough to cover a broad range of services including signature and confidentiality services.
2. The scheme should be demonstrably rigorous, impartial and trusted by all sectors of industry (i.e. it needs support from a broad cross-section of industry, including users). It should not act as a barrier to new entrants to the market.
3. The scheme should have a means of taking into account the views of consumers.
4. The scheme needs the ability to set standards (procedural and technical). If the scheme is non-statutory, there needs to be a clear mechanism for Government to monitor progress and influence the development of such standards, in line with its objectives for promoting electronic commerce, Modernising Government and law enforcement.
5. The scheme needs effective mechanisms for ensuring compliance with these standards, including for example:
 - a) assessment of service providers, perhaps linked to a “kitemark”;
 - b) sanctions and the ability to monitor and take enforcement action against members that breach the “code of practice”;
 - c) a means of redress for consumers if consumers are unhappy with the response from the service provider;
 - d) publicity, i.e. making available the code of practice, a register of members and, perhaps, annual reports aimed at consumers.
6. The scheme should take account of the draft EU Electronic Signatures Directive (including provisions on liability and data protection). In particular it should provide UK providers with a means of showing that their signature service meets the standards envisaged in the draft Directive, to facilitate trade with other EU countries. There could be scope for different levels of service, so it might not be necessary for all signatures to meet the Directive standards.

Paragraph 73 A comparison of the 1997 and 1999 DTI consultation documents would suggest that little effort has been devoted over the last two years to considering the detailed licensing criteria to be applied to TSPs, or the effect of such criteria on the market. The licensing criteria for TSPs recently set out by DTI are not fit to be written into law. Unless they are improved, then the licensing system will be a damaging and embarrassing failure. We invite the Government to inform Parliament how it intends to work with electronic commerce providers and users to design more suitable criteria.

29. We do not accept this criticism. The previous consultation document made it clear that these were draft criteria and that potential licence applicants would be consulted about refining them. Nevertheless, the draft criteria reflected discussions with industry and were largely consistent with those laid down in the Annexes to the draft Electronic Signatures Directive. Respondents to the previous consultation Document (comments were specifically requested) did not seem to share the Committee’s view and certainly did not suggest they were unfit to be written into law. Indeed, although many respondents argued that what was proposed was more suitable for an industry-led accreditation scheme, there seemed to be a general appreciation that the draft criteria were a sensible basis for a scheme.

30. The DTI will continue to work with industry in developing a set of criteria designed to generate public confidence that cryptography services from a TSP approved under the UK regime are high-quality and reliable. The DTI will also work with industry in representing UK interests in refining the criteria outlined in the draft EU Electronic Signatures Directive, which will form the basis of mutual recognition of electronic signatures in the EU.

Paragraph 79 We recommend that the Government exercise caution before implementing a statutory liability regime in this nascent market. We suggest that, until the market develops further, the most useful requirement might be for TSPs to set out in full their liability provisions, including relevant limits, both to users and third parties, including how liabilities can be met, to assist consumer choice of TSP and swift redress when problems are encountered.

31. In the consultation document *Building Confidence in Electronic Commerce*, the Government recognised the complex issues involved in apportioning the liability of Trust Service Providers, and the need to balance the interests of the various parties who may be involved, either directly and indirectly, in a particular transaction. In the light of responses to the previous consultation the Government has decided not to introduce a statutory liability regime, and rely on the contract between the TSP and their client, and existing law. We will expect TSPs to make clear to their customers the extent of their liability.

Paragraph 80 We are persuaded that encryption will increasingly be a source of advantage to criminals with which law enforcement agencies are, at present, inadequately prepared to deal.

32. The Committee has highlighted concerns that the Government has had for some time. The Government is determined to ensure that the statutory powers on which the law enforcement agencies rely in combating crime are not undermined by new technologies. That is why, as part of a package of measures being proposed in an attempt to mitigate the consequences of rising criminal use of encryption, the Government proposes to use Part III of the Bill to introduce powers allowing properly authorised persons (such as members of law enforcement agencies) to serve written notices requiring any person to provide the means necessary (e.g. a decryption key) to make legally obtained material intelligible or to produce the material in an intelligible form.

Paragraph 81 We suggest that those organisations involved in electronic commerce will be much more willing to help the law enforcement agencies if there are reliable means to assess the extent of the problems posed by encryption, and that there would be advantage in Parliament having a fuller picture of the perceived threat.

33. The Government has been working closely with industry on this issue. The PIU Report on Encryption and Law Enforcement recommended that an approach based on openness and co-operation with industry would balance the aim of giving the UK the world's best environment for e-commerce with the needs of law enforcement.

34. The Government has accepted this recommendation and is in the process of establishing a new Government/industry joint forum, to be chaired by the DTI. The joint forum will discuss the development of encryption technologies and ensure that the needs of law enforcement agencies are understood by the industry.

Paragraph 90 By dropping key escrow as a licensing condition for TSPs, the DTI's third attempt to formulate an acceptable cryptography policy is a marked improvement on its predecessors. We are disappointed, however, that the Government should still hold a candle for key escrow and key recovery. We can foresee no benefits arising from Government promotion of key escrow or key recovery technologies.

Paragraph 107 If the Government consider it necessary in future to introduce key escrow, key recovery or a related requirement on TSPs then we recommend that they do so only after stating precisely the reasons why such a change would be necessary as part of a full public consultation exercise. Powers should not be taken in the forthcoming Bill to permit the introduction of key escrow or related requirements at a later date.

35. The challenge that encryption poses for law enforcement is taken seriously by the Government. The Prime Minister personally launched the Cabinet Office PIU Study on Encryption and Law Enforcement and has accepted their recommendations.

36. In particular, the Government agrees with the PIU's conclusion that the widespread adoption of key escrow and key recovery is unlikely in the current climate. The Government therefore accepted the recommendation that a mandatory link between approved providers of services and key escrow would not support the Government's twin objectives on e-commerce and law enforcement.

Paragraph 98 We think that the proposed new power to require decrypted data or private encryption keys to be provided when appropriately authorised will be a useful addition to the armoury of the law enforcement agencies. We recommend that the Government quickly clarify the situations in which it thinks this power will be likely to prove most helpful. In particular, Parliament should be given an indication of the criteria which will be used to decide against whom written notices for the provision of information will be served and whether it is proposed that the request should be for a private key or decrypted data.

37. The Government welcomes the Committee's support for this measure. Strong encryption is already being used by criminals to conceal their activities. This is creating difficulties for law enforcement agencies and these will increase as the use of encryption becomes more widespread. The Government foresees that strong encryption will become the technology of choice for criminals wishing to protect the contents of their communications and data. The new powers proposed in Part III of the draft Bill will assist law enforcement agencies in their investigations wherever criminals are using encryption in an attempt to conceal their activities.

38. The draft Bill sets out the conditions under which the service of written notices requiring the surrender of decryption keys or plain text may be authorised and who may authorise the use of the new powers. The ability to serve a written notice will be ancillary to existing statutory powers. This means that the new powers will apply only to material that is, or has been, lawfully obtained. The draft Bill provides that the disclosure of plain text rather than a key may be acceptable in all cases unless the written notice specifies that only the disclosure of a key itself is sufficient.

Paragraph 101 It is entirely unacceptable that the Government should announce a major review of the Interception of Communications Act 1985 and then fail to publish any further details of the review for over eight months, especially when the consultation exercise on building confidence in electronic commerce explicitly refers to the Act and the review. We recommend that the Government set out the options for change to the interceptions regime, and how they relate to the forthcoming Electronic Commerce Bill, before the Bill is debated by Parliament.

39. The Home Secretary published a consultation document⁶ (Cm 4368) on the review of the Interception of Communications Act 1985 (IOCA) on 22 June. This review relates to the draft Electronic Communications Bill to the extent that the powers proposed in Part III of the draft Bill are designed to maintain the effectiveness of existing statutory powers including IOCA. These powers, to require the disclosure of decryption keys or plain text, will be available when encryption is encountered in interception operations authorised by the Secretary of State under IOCA. Without pre-empting the wider conclusions of the IOCA review, there is a need to address the threat posed by encryption and to protect the effectiveness of the existing interception regime.

⁶ It is available at www.homeoffice.gov.uk and from the Stationery Office. Responses are requested by 13 August and may be sent by email to ioca@homeoffice.gsi.gov.uk

Paragraph 102 We recommend that the Government give authoritative clarification of the status of the Enfopol proposals and their potential implications for relevant UK service providers.

40. The draft EU Council Resolution on interception of new technologies (the so-called ENFOPOL proposals) supplements the existing Council Resolution of January 1995 on the lawful interception of communications. It makes clear that the law enforcement agencies' requirements annexed to the 1995 Resolution apply equally to new technologies such as satellite and internet communications.

41. Council Resolutions are not legally binding. The 1995 Council Resolution, for example, has not been incorporated into UK law. It is used solely as a basis for discussions with telecommunications operators in accordance with the statutory safeguards contained in the Interception of Communications Act 1985 (IOCA). It follows that if adopted, the present draft Resolution on interception of new technologies would place no legal obligations on telecommunications or Internet Service Providers in the UK.

42. The Government submitted an Explanatory Memorandum to Parliament on the draft Resolution on 8 February 1999 (10951/2/98 ENFOPOL 98 Rev 2). In fact, the Government sees little need for the draft resolution at the present time. The Government's consultation document on the review of IOCA published on 22 June, includes consideration of the needs of law enforcement agencies in respect of providers of new communication technologies such as the internet and satellite telephony. The proposal for a draft Resolution will not prejudice this consultation process.

Paragraph 105 If, after three years of considering its policy on cryptography, the Government should announce the need for a partnership with industry, then that would suggest failure in the past to create such a partnership. We consider that the fault for failing to create such a partnership lies not with industry, which would appear to have been ready and willing to help, but with Government. Although DTI has been willing to listen to what industry and others have had to say about cryptography, we have gained the impression that they have not, until recently, taken much notice of what has been said to them. From now on, we expect the Government to work with all interested parties to devise a cryptography policy which is best for the UK as a whole, rather than one which is geared towards satisfying law enforcement concerns at the expense of Britain's economic competitiveness.

43. On the contrary, the Government has worked with industry (users, technology providers and potential TSPs) in developing its policy on encryption. Over the last five years the DTI has hosted regular meetings of its Cryptography Working Group. The DTI has also regularly participated in the information security working groups of the CBI, the Federation of the Electronics Industry (FEI) and the British Computer Society (BCS). The Government recognises the importance of balancing the needs of all concerned — industry, users, law enforcement agencies and the general public — in this sensitive area.

44. In his foreword to the PIU Encryption report, the Prime Minister said:

"I am determined to ensure that the UK provides the best environment in the world for electronic business. Only by taking a lead to promote electronic business will we reap the potential economic and social benefits. But I am equally determined to ensure that the UK remains a safe and free country in which to live and work.

The rise of encryption technologies threatens to bring the achievement of these two objectives into conflict. On the one hand, business has delivered a clear message that encryption is essential for developing confidence in the security of electronic transactions. And lack of confidence is often cited as one of the main brakes on electronic commerce. People also want to enhance the security of their personal communications through the use of encryption. To meet these needs, the Government is keen to support the strong and growing market in encryption products and services.

On the other hand, the use of encryption by major criminals and terrorists could seriously frustrate the work of the law enforcement agencies. Indeed there is already evidence that criminals, such as paedophiles and terrorists, are using encryption to conceal their activities. It is a little known fact that on average one in every two interception warrants issued results in the arrest of a person involved in serious crime. If powers of interception and seizure are rendered ineffective by encryption, all society will suffer. So it is vital that in our support for the use of encryption we limit the damage to our ability to protect society.”

45. The Government will continue to engage with industry on a dialogue on these important issues; through the Industry-government forum proposed by the PIU and through other fora.

Paragraph 106 We recommend that the Government keep Parliament informed of the remit and membership of the Cabinet Office task force dealing with law enforcement aspects of electronic commerce and of any body established in its place.

46. The Performance and Innovation Unit (PIU) was created in 1998, to improve the capacity of government to address strategic, cross-cutting issues and promote innovation in the development of policy and delivery of the Government’s objectives. It acts as a resource for the whole of government, tackling issues on a project basis.

47. In February 1999 the Prime Minister asked the PIU to consider the issue of encryption and law enforcement, as a subset of its ongoing project on electronic commerce. The remit given to the PIU was:

- to study the needs of law enforcement agencies and of business;
- to examine the merits of the current encryption policy (and in particular key escrow); and, if necessary,
- to identify proposals that would satisfy both the need to promote encryption for electronic commerce and the Government’s duty to ensure that public safety is not jeopardised.

48. To handle this remit, a joint Government/industry task force led by David Hendon (Chief Executive of the Radiocommunications Agency), working alongside the existing PIU electronic commerce project team led by Jim Norton, was established to examine the issue and to recommend a way forward to the Prime Minister. The task force’s membership was drawn from:

the Home Office;
the National Criminal Intelligence Service (NCIS);
GCHQ Communications-Electronics Security Group;
the Department of Trade and Industry;
the Cabinet Office;
British Telecommunications; and
IBM.

Its main findings and recommendations were published on 26 May. The task force was wound up after it had completed its work. The coordination of the further work will be taken forward by a special Unit set up in the Home Office.

Paragraph 108 We suggest that the experience of the relationship between ISPs and the law enforcement agencies underlines the need for openness and transparency in the new partnership between industry and Government on law enforcement aspects of encryption, so as to avoid confidence in electronic commerce being undermined.

49. The Government fully recognises the importance of working with industry on these issues. That is why a joint Government/industry forum is presently being established as a focus for this new co-operative approach. This co-operation needs to be established on a basis of trust between both parties. It will help industry understand the threat to law enforcement capabilities posed by encryption and will assist law enforcement in understanding market trends and realities.

50. The UK has been very successful in developing an effective working relationship between Internet Service Providers (ISPs) and law enforcement interests. The regular forum, currently chaired by the Association of Chief Police Officers, which includes a wide range of industry and law enforcement interests, together with representatives of the DTI and Home Office, has played a central role in developing and maintaining this relationship.

51. The forum has already produced a form for use by Police forces in requesting information from ISPs under section 28.3 of the Data Protection Act, which is now in the public domain. In addition, a best practice document on traceability will shortly be published, once it has been agreed and ratified by the ISP industry. The aim is for this document to become the industry standard for tracing those responsible for the misuse of the internet. The forum is also working on a number of other projects and is actively considering what more can be done to make the results of its work widely available in order to meet concerns about the transparency of its discussions.

Paragraph 110 We see merit in NCIS being notified whenever a local law enforcement agency encounters encryption during the course of a criminal investigation.

52. The Government understands that NCIS (the National Criminal Intelligence Service) sees merit in the establishment of such a national notification scheme and that, at least initially, notifications should be sent to NCIS as part of a strategic threat assessment of criminal use of encryption. Work is in hand to address this issue further.

Paragraph 110 We also recommend that the Government consider the establishment of a law enforcement resource unit for dealing with computer crime, including encryption.

53. In line with the Committee's recommendation, and as recommended in the recently published PIU report, the Government has decided to establish a dedicated resource (a new Technical Assistance Centre), operating on a 24 hour basis, to help law enforcement agencies derive intelligence from lawfully intercepted communications and lawfully retrieved stored data. It is envisaged that the Technical Assistance Centre will also be responsible for gaining access to decryption keys, where they exist, under proper authorisation.

54. Separately, the issue of whether to establish a national high technology crime unit is currently being considered by the Association of Chief Police Officers (ACPO) Crime Committee.

Paragraph 112 We recommend that the Government consider the case for a review of the rationale for the continuation of export controls on cryptographic products, in the light of their widespread availability, and the procedures by which such controls are implemented.

55. The Government recognises that export controls on encryption products cause problems for exporters and also sometimes prevent IT users acquiring the security technology they need. The Government has sought to ensure that the controls bite only on encryption technologies which — if widely exported — would damage its international objectives of combating terrorism and crime prevention. An example of this is the recent issue of an “open” export licence for personal users of laptops incorporating strong encryption.

56. The export controls on encryption, which are set internationally within the Wassenaar Arrangements, were reviewed as recently as December 1998. The new, and relaxed, controls, have been broadly welcomed by industry. They will soon be implemented in the UK.

Paragraph 113 Although the forthcoming Electronic Commerce Bill is not likely to be a source of party political controversy it is a vital measure for UK competitiveness and law enforcement. It requires full and rigorous parliamentary scrutiny.

57. The Government is now consulting on the draft Bill. The Government expects that, when introduced, the Bill, like any other, will be fully scrutinised by Parliament.

Paragraph 114 We recommend that DTI publish a full analysis of responses received to its recent consultation document, including a list of those who responded to the document, at the same time as the Electronic Commerce Bill is published.

58. The DTI published today a summary, by independent consultants, of the responses to the consultation. The summary, and a list of respondents, is available on the DTI's website (www.dti.gov.uk/cii/conrep.htm).

Paragraph 115 We recommend that draft regulations arising from the Electronic Commerce Bill be given full public scrutiny before they become law.

59. The Government believes that the draft Bill has already benefited from previous consultation on the underlying policy, and looks forward to the responses to this consultation. In general, the secondary legislation made under the Bill is also likely to benefit from formal public consultation. The Committee's recommendation was made in the context of the approvals criteria and the regulations to facilitate electronic communications and storage.

60. The Government is committed to developing the approvals criteria in consultation with potential applicants for approval, and users of their services, and will consult formally on all such regulations.

61. The Government also plans to consult widely on draft regulations relating to the facilitation of electronic communications and storage (Clause 8). However, once general principles have been established and agreed on in the first series of regulations it may no longer be necessary to do this in every case, unless new points arise. The Government will, therefore, keep consultation on such regulations under review.

ELECTRONIC COMMUNICATIONS BILL

EXPLANATORY NOTES

These notes refer to the draft Electronic Communications Bill as published for consultation on 23 July 1999

INTRODUCTION

1. These explanatory notes relate to the draft Electronic Communications Bill which was published by the Government on 23 July 1999. They have been prepared by the Department of Trade and Industry and the Home Office in order to assist the reader of the draft Bill and to help inform debate on it.
2. The notes need to be read in conjunction with the draft Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The Government's policy is to facilitate electronic commerce. It has also set itself targets for making Government services available electronically: 25% by 2002, 50% by 2005 and 100% by 2008. The Government has also set a target for 90% of its routine Government procurement of goods to be done electronically by 2001.
4. The Government's general policy towards electronic communications and information technology is set out in:
 - the Competitiveness White Paper (Cm 4176) published in December 1998 (available on the DTI website: www.dti.gov.uk/com/competitive);
 - the Modernising Government White Paper (Cm 4310) published in March 1999 (available on the Cabinet Office website: www.cabinet-office.gov.uk/moderngov/1999/whitepaper/index.htm); and
 - the Government's policy statement "Our Information Age: The Government's Vision" (URN 98/677; 4-98) (a summary can be found on the Number 10 website: www.number-10.gov.uk/public/info/index.html).
5. Cryptography and electronic signatures are important elements for electronic transactions.
 - *Cryptography* is the science of codes and cyphers. Cryptography has long been applied by banks and is an essential tool for electronic commerce. Cryptography can be used as the basis of an electronic signature, or to keep electronic data confidential; while another is to ensure that the integrity of such information is preserved.
 - *Encryption* is the process of turning normal text into a series of letters and/or numbers which can only be deciphered by someone who has the correct password or key. Encryption is used to prevent others reading confidential, private or commercial data (for example an e-mail sent over the internet or a file stored on floppy disk).

- An *electronic signature* is something associated with an electronic document that is the equivalent of a manual signature. It can be used to give the recipient confirmation that the communication comes from who it purports to come from (“authenticity”). Another important use of electronic signatures is establishing that the communication has not been tampered with (“integrity”).

6. Various organisations provide cryptography services, including certifying the public key of an individual used in the generation of electronic signatures. There is a need for the public to be able to have confidence that these services are secure and not open to fraud; and for people to be free from unnecessary restrictions in their use of new technology. On the other hand, there is the problem that encryption can be used for criminal purposes and to frustrate the work of law enforcement and security services.

THE BILL

7. The main purpose of the Bill is to help build confidence in electronic commerce and the technology underlying it by providing for:

- a statutory approvals scheme for businesses and other organisations providing cryptography services, such as electronic signature services and confidentiality services.
- the legal recognition of electronic signatures, and
- the removal of obstacles in other legislation to the use of electronic communication and storage in place of paper.

8. The Bill also contains provisions to maintain the effectiveness of existing law enforcement powers in the face of increasing criminal use of encryption, and to update procedures for modifying telecommunications licences.

9. The Bill is in four parts.

- **Part I, Cryptography Service Providers.** This concerns the arrangements for registering providers of cryptography support services, such as electronic signature services and confidentiality services.
- **Part II, Facilitation of Electronic Commerce, Data Storage etc.** This makes provision for the legal recognition of electronic signatures. It will also facilitate the use of electronic communications or electronic storage of information, as an alternative to traditional means of communication or storage.
- **Part III, Investigation of Protected Electronic Data.** This provides new powers to assist (for example) law enforcement agencies in making intelligible lawfully obtained stored or intercepted data which has been encrypted. This Part also creates two new offences and establishes oversight procedures and safeguards in relation to the new powers.
- **Part IV, Miscellaneous and Supplemental.** This Part amends section 12 of the Telecommunications Act 1984 and inserts new sections (12A and 12B) into that Act. The proposed new provisions are concerned with the modification

of telecommunication licences otherwise than in pursuance of a reference to the Competition Commission. This Part also concerns matters such as general interpretation, the short title, commencement and territorial extent of this Bill.

10. The Bill contains two Schedules relating to Part III:

- **Schedule 1, Persons Having The Appropriate Permission.** This concerns the duration and types of appropriate permission which may empower a person to serve a notice under Clause 10 of this Bill requiring the disclosure of information.
- **Schedule 2, The Tribunal.** This concerns the constitution and procedure of, and appointments to, the Tribunal to be established under Clause 18 to hear complaints about written notices served as a result of authorisations granted by the Secretary of State.

Consultation

Parts I to III

11. The first consultation on most of the matters covered by Parts I to III was undertaken by the previous administration in March 1997.

12. The Government announced its response to that consultation, and its policy on the provision of cryptography services, in a parliamentary statement by Mrs Barbara Roche, then Parliamentary Under Secretary of State at the Department of Trade and Industry, on 27 April 1998 (Hansard, HoC, column 27; available on the Parliament website at www.parliament.uk/commons.htm).

13. A broader consultation — “Building Confidence in Electronic Commerce: A Consultation Document” (URN 99/642) (available on the DTI website at www.dti.gov.uk/cii/elec/elec_com.html) — was launched on 5 March 1999. A summary of the responses to this consultation (URN 99/891) is available on the DTI website at www.dti.gov.uk/cii/elec/conrep.html.

14. The Trade and Industry Select Committee of the House of Commons published a report on the matters covered by the consultation document on 18 May 1999 (“*Building Confidence in Electronic Commerce: The Government’s Proposals*”, HC 187; available on the Parliament website at www.parliament.uk/commons/selcom/t&ihome.htm). This document also contains the Government’s Response to the Select Committee’s report. This Response also sets out the Government’s decisions on the issues covered by the Consultation Document.

Part IV

15. There have been two formal consultations on the revised licence modification procedure provided for in Part IV of the Bill. The first, “Licence Modification Procedure: Proposed Changes to the Telecommunications Act 1984” (URN 98/1049), was issued in May 1998; the second, “Licence Modification Procedure: Updated Proposals for Changes to the Telecommunications Act 1984” (URN 99/945), in March 1999 (available on the DTI website at www.dti.gov.uk/telecom/teleprop.htm.)

16. Responses to all these consultation exercises have contributed to the measures set out in the Bill.

17. This Bill is consistent with the draft EU Electronic Signatures Directive, which is intended to harmonise the legal acceptance of certain electronic signatures throughout the European Union, and on which a common position was reached in Council in April 1999. It is also compatible with the Cryptography Guidelines, published by the Organisation for Economic Co-operation and Development (OECD) on 19 March 97 (available on the OECD website at: www.oecd.org/subject/e_commerce), and the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Electronic Commerce (available on the UN website at: www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm).

18. The broad aim of the Bill, facilitating electronic commerce, is similar to that of the draft EU Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, which seeks to remove barriers to the development of electronic commerce in the internal market, but there is no overlap in the detailed provisions. The main areas addressed in the proposed directive are simplifying and clarifying rules of establishment, ensuring consistency in approaches to commercial communications such as definitions of advertising, ensuring legal validity of electronic contracts and clarifying the liability issues of intermediaries.

COMMENTARY ON CLAUSES

Clause 1: Register of approved providers

This clause places a duty on the Secretary of State to establish and maintain a register of approved providers of cryptography support services, and specifies what information is to be contained in the register. The clause also requires the Secretary of State to make arrangements for the public to have access to the register and for any changes to the information in the register to be publicised.

* *cryptography support services* are defined in Clause 6.

The main purpose of the register is to ensure that providers on the register have been independently assessed against particular standards of quality, in order to encourage the use of their services, and hence the development of electronic commerce and electronic communication with Government.

Where two people are communicating electronically, it may be necessary for one person to rely on the services provided to the other: for example, where the first person receives a communication which purports to have been signed electronically by the other.

* a definition of *electronic signature* for these purposes is given in Clause 7(2).

The register is voluntary: no provider is obliged to apply for approval and a provider who is not on the register is at liberty to provide cryptography services.

Clause 2: Arrangements for the grant of approvals

This Clause places a duty on the Secretary of State to ensure that there are arrangements in force for granting approval, handling complaints and disputes and modifying or withdrawing approval.

Subsection (1) places a duty on the Secretary of State to ensure that there are arrangements for granting approvals for any person providing, or proposing to provide, cryptography support services in the United Kingdom, and applying to be approved.

* The provision of *cryptography support services in the United Kingdom* is described in Clause 6.

Subsection (2) sets out what the arrangements for approvals are to achieve.

Subsection (4) allows for regulations made by virtue of subsection (3)(a) or (b) to frame the requirement for compliance with these requirements by reference to the opinion of a person specified, either in the regulations or chosen in a manner set out in the regulations.

Subsection (6) provides for the enforcement of any requirement to provide information imposed by the conditions of an approval, by the Secretary of State in civil proceedings.

Subsections (7) and (8) make provision about the payment of fees.

The arrangements for approvals, outlined above, envisage providers requesting approval for one, or a number, of different cryptography support services. The granting of such an approval would depend on the applicant meeting the conditions specified in the relevant regulations.

Clause 3: Delegation of approval functions

This Clause enables the Secretary of State to delegate the approvals functions set out in Clauses 1 and 2 to any person.

Clause 4: Restrictions on disclosure of information

This Clause protects certain information obtained under Part I, sets out the purposes for which it may be disclosed, and makes improper disclosure a criminal offence. In particular, it safeguards individual privacy and commercially confidential information, except where disclosure is desirable.

There is no restriction on who may make the disclosure or to whom it may be made, provided that the purpose is proper.

Clause 5: Regulations of Part I

This Clause makes further provision relating to the regulations the Secretary of State may make under Part I and contains standard provisions commonly accorded to powers to make subordinate legislation, such as an ability to make supplementary provision.

- * *prescribed* is defined in this Part as meaning prescribed by regulations, or determined in such a manner as may be provided for in such regulations.

Clause 6: Provision of cryptography support services

This Clause provides for the interpretation of various terms used in Part I of the Bill.

- * The *cryptography support services* that may be approved under the arrangements described above are defined to include those relating to:
 - *confidentiality*, i.e. keeping electronic data secret;
 - the *authenticity* or *integrity* (both defined in Clause 23) of electronic data, i.e. relating to an electronic signature.

Subsection (2) makes it clear that the approval scheme for cryptography support services includes only those services that primarily involve a continuing relationship between the supplier of the service and the customer. The scheme is not intended to cover the purchase of an item (whether software or hardware) unless such purchase is only intended to be incidental to the provision of the cryptography support service.

Subsection (3) sets out what is meant by cryptography support services being *provided in the United Kingdom*.

Cryptography support services, falling within the scope of this Clause, would include registration and certification in relation to certificates, time-stamping of certificates or documents, key generation and management, key-storage and providing directories of certificates.

Clause 7: Electronic signatures and related certificates

This Clause provides for the admissibility of electronic signatures and related certificates in legal proceedings.

It will be for the court to decide in a particular case whether an electronic signature has been correctly used and what weight it should be given (e.g. in relation to the authentication or integrity of a message) against other evidence. Some businesses have contracted with each other on paper about how they are to treat each other's electronic communications. Clauses 7 and 8 do not cast any doubt on such arrangements.

Subsection (1) allows an electronic signature, or a certificate, to be admissible as evidence in respect of any question regarding the authenticity or integrity of an electronic communication. *Authenticity and integrity* are both defined in Clause 23.

Subsection (2) defines an *electronic signature* for the purposes of the Clause.

Subsection (3) explains what is meant by *certified* in this context.

Clause 8: Power to modify legislation

This power is designed to remove restrictions in other legislation which prevent the use of electronic communication in place of paper, and to enable the use of electronic communications to be regulated where it is already allowed. The power can be used selectively to offer the electronic alternative to those who want it.

There is a large number of provisions in statutes on many different topics which require the use of paper or might be interpreted to require this. Many of these cases involve communication with Government Departments by businesses or individuals — including submitting information or applying for licences or permits. Other cases concern communications between businesses and individuals, where there is a statutory requirement that the communication should be on paper. The power can be used in any of these cases.

Some examples of the way in which the power could be used relate to the Companies Act 1985. On 5 March 1999 the DTI consulted about whether the Act should be changed to enable companies to use electronic means to deliver company communications, to receive shareholder proxy and voting instructions and to incorporate. The consultation letter “*Electronic Communication: Change To The Companies Act 1985*” is available from DTI's Company Law and Investigations Directorate, telephone 0171 215 0409. The proposals attracted strong support from respondents.

There are, by contrast, many communications where paper is not currently required — for example the vast majority of contracts fall into this category. People will remain free to undertake transactions of this kind using whatever form of communication they wish.

Subsection (1) gives the appropriate Minister the power to modify, by order made by statutory instrument, the provisions of any legislation for which he is responsible. He may authorise or facilitate the use of electronic communications or electronic storage (instead of other methods of communication or storage) for any purpose mentioned in subsection (2). This power is limited by *subsection (3)* which places a duty on the Minister not to make such an order unless he is satisfied that it will be possible to produce a record of anything that is done by virtue of the authorisation. It is also limited by subsection (6) so that a person cannot be required to abandon paper unless he has previously chosen to do so.

* The *appropriate Minister* is defined in Clause 9 (1).

Subsection (2) describes the purposes for which modification by an order may be made.

Subsection (4) specifies the types of requirement about electronic communications or the use of electronic storage that may be provided for in an order under this Clause.

Subsection (6) provides that an order under this Clause cannot require the use of electronic communications or electronic storage except when someone has previously elected or decided to make use of such communications or storage. When someone has previously chosen the electronic option, restrictions or conditions may be imposed on the variation or withdrawal of such a choice.

Subsection (7) provides that this Clause does not apply to matters under the care and management of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise. Such matters are already covered in Part VIII of the current Finance Bill.

Clause 9: Supplemental provision about Clause 8 orders

This Clause sets out supplementary provisions relating to orders made under Clause 8 and contains standard provisions commonly accorded to powers to make subordinate legislation, such as an ability to make supplementary provision.

Subsections (3) and (4) provide that the regulations made under Clause 8 will be subject to a choice of either affirmative or negative resolution procedure in both Houses of Parliament. The Government intends to use affirmative resolution at least for the first order, so that the general principles can be debated.

Clause 10: Power to require disclosure of key

This Clause sets out the conditions under which notices can be served requiring disclosure of a key necessary to make lawfully obtained protected information intelligible.

- * *key* is defined in Clause 19(1), and
- * *intelligible* is defined in Clause 23(3).

This Clause introduces a power to enable properly authorised persons (such as members of the law enforcement, security and intelligence agencies) to serve written notices on individuals or bodies requiring the surrender of information (such as a decryption key) to enable them to understand (essentially make intelligible) protected material which they legally hold or are likely to. By way of illustration, this could include material:

- seized under a judicial warrant (e.g. under the Police and Criminal Evidence Act 1984 (PACE));
- intercepted under a warrant personally authorised by the Secretary of State under the Interception of Communications Act 1985;
- lawfully obtained by an agency under their statutory powers but not under a warrant (e.g. section 18 of PACE — on entry and search after arrest); or
- which has lawfully come into the possession of an agency but not by use of statutory powers (e.g. material which has been voluntarily handed over).

The service of a written notice will need to be authorised by, for example, the Secretary of State, a judge, or a senior police officer, depending on the powers under which the protected material was or is likely to be obtained.

Subsection (1) limits the information to which this power to serve notices applies. It does so by defining the various means by which the information in question has been or is likely to be lawfully acquired.

Subsection (2) states that persons with the “appropriate permission” (see Schedule 1) can serve a notice demanding that the key be provided to make the unintelligible data intelligible if it appears to them that they:

- are serving the notice on a person who has the key in their possession; and
- they cannot obtain the key by other reasonable means.

Subsection (3) explains the way in which the notice must be given and what it must state.

Subsection (4) specifies the persons to whom the key may be disclosed.

Subsection (5) ensures that a key which has been solely used for the purpose of generating electronic signatures does not have to be disclosed in response to a notice.

* for the purposes of this Part *electronic signature* is defined in Clause 19(1)

* for the purposes of this Part a *key* is defined in Clause 19(1).

Subsection (7) safeguards existing powers to demand lawful access to protected information. For example, it ensures that this Bill will have no bearing on the use of powers under the Criminal Justice Act 1987.

Section 2 of the Criminal Justice Act 1987 empowers the Director of the Serious Fraud Office to require a person to answer questions, furnish information or produce any specified documents which are relevant to an investigation.

Clause 11: Disclosure of information in place of key

This Clause provides that a person required by a written notice to disclose a key may instead provide the data in an intelligible form, unless the person who gave the authorisation to require the disclosure, or a person entitled to give such authorisation, has specified that only the disclosure of the key itself is sufficient.

This Clause would, for example, allow a company — that might have received an encrypted message from the target of a particular enquiry (e.g. a criminal) — to offer up a intelligible copy of the message (e.g. a printed document) rather than any decryption key.

Clause 12: Failure to comply with a notice

This Clause makes it an offence to fail to comply with a notice given under Clause 10. It allows a defence to a person who shows that he did not have the key to the information (or, where appropriate, the information itself) but gave as much information as he had about how the key could be obtained; or that he did what was required of him as soon as was reasonably practicable.

Clause 13: Tipping-off

This Clause creates a new offence where the recipient of a notice, or a person that becomes aware of it, tips off another that a notice has been served or reveals its contents.

This Clause is to preserve, where necessary, the covert nature of an investigation by, for example, a law enforcement agency. Among the various defences outlined is one where the software used by the recipient of a notice (for example an IT administrator in a company) causes the owner(s) of keys to be alerted when a key is accessed.

Subsection (1) limits this offence to occasions where the notice served explicitly demands secrecy.

Subsection (3) to (5), and (7) and (8), provide various defences against a charge of tipping off.

The effect of *subsection (6)* is that the protection in subsections (4) and (5) will not apply where a professional legal adviser tips off a client with a view to furthering any criminal purpose.

Clause 14: Provisions supplemental to sections 12 and 13

Subsection (1) specifies the maximum sentence for the offence of failing to comply with a notice. As regards financial penalties there is no upper limit.

Subsection (2) specifies the maximum sentence for tipping-off a third party about the serving of a notice. As regards financial penalties there is no upper limit.

Subsection (3) excludes the offences under Clauses 11 and 12 of this Bill from the provisions of section 9 of the Interception of Communications Act 1985.

Section 9(1) of the Interception of Communications Act 1985 provides that in any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which tends to suggest that an offence under section 1 of that Act (which prohibits interception except in certain circumstances) has been or is to be committed by any person holding office under the Crown, or anyone engaged in the business of the Post Office or in the running of a public telecommunication system; or which tends to suggest that an interception warrant has been or is to be issued to any of those persons.

Clause 15: General duties of specified authorities

This Clause describes the safeguards that must be in place for the protection of any material handed over in response to the serving of a notice under this Bill.

Subsection (1) ensures that the safeguard requirements apply to all those who may have responsibility for organisations that will handle material provided in response to a notice. In the case of the security and intelligence agencies for example, this will mean the Secretary of State.

Subsections (2) and (3) place an onus on those identified to ensure that:

- any material disclosed is used only for the purpose for which it was required;
- the uses to which the material is put are reasonable and proportionate;
- the material is destroyed as soon as it is no longer needed; and
- the material is shared with the minimum number of people.

Clause 16: Code of practice

This Clause requires the Secretary of State to issue a Code of practice covering the exercise of the powers to authorise the issuing of disclosure notices under Part III of the Bill. It provides that:

- the Secretary of State will first publish a draft of the Code;
- the Code will be brought into force by order under statutory instrument;
- the statutory instrument will be subject to affirmative resolution in both Houses; and
- the Code may be revised from time to time by means of the same steps as it was originally brought into force.

Clause 17: The Commissioner

This Clause provides for the appointment of a Commissioner to oversee the use of the powers of the Secretary of State to authorise the issuing of disclosure notices under Part III of the Bill.

In practice, this will apply to material acquired pursuant to a warrant signed by the Secretary of State under the Interception of Communications Act 1985, the Intelligence Services Act 1994, and the Security Service Act 1989 as amended by the Security Service Act 1996.

The powers granted to other bodies under this Bill can be reviewed by the courts.

“High Judicial Office” is defined in section 25 of the Appellate Jurisdiction Act 1876 as follows:

“High Judicial Office” means any of the following offices; that is to say

The office of Lord Chancellor of Great Britain... or of Judge of one of Her Majesty’s superior courts of Great Britain and Ireland:

‘Superior courts of Great Britain and Ireland’ means and includes

As to England, Her Majesty’s High Court of Justice and Her Majesty’s Court of Appeal; and

As to Northern Ireland, Her Majesty’s High Court of Justice in Northern Ireland and Her Majesty’s Court of Appeal in Northern Ireland; and

As to Scotland, the Court of Session.”

The Appellate Jurisdiction Act of 1887 amended the term ‘High Judicial Office’ in section 5 to include the office of a Lord of Appeal in Ordinary and the office of a member of the Judicial Committee of the Privy Council.

Clause 18: The Tribunal

This Clause establishes a Tribunal to hear complaints in certain cases and award compensation.

Subsection (1) outlines the instances where the Tribunal will hear complaints. The first case is where permission of the Secretary of State is required for the issuing of a notice under Clause 10. This applies to cases arising from warrants signed under:

- Interception of Communications Act 1985; or
- Intelligence Services Act 1994.

The second case is where a person is restricted from relying in any proceedings before a court or tribunal on anything done under this Part of the Bill or on any contravention of this Part by virtue of section 9 of the Interception of Communications Act 1985. For example, this could occur where legal proceedings were being taken against a service provider who had been the recipient of a Clause 10 notice in relation to intercepted material.

Subsection (5) states that section 9 of the Interception of Communications Act 1985 is not to apply to hearings before the Tribunal.

Subsection (7) specifies those who may apply to the Tribunal.

Clause 19: Interpretation of Part III

This Clause provides for the interpretation of various terms used in Part III.

“GCHQ” is defined in section 3(3) the Intelligence Services Act 1994 as follows:

“In this Act the expression “GCHQ” refers to the Government Communications Headquarters and to any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

“Her Majesty’s Forces” is defined in section 225(1) of the Army Act 1955 to mean Her Majesty’s air forces, military forces and naval forces.

“Wireless Telegraphy” is defined in section 19(1) of the Wireless Telegraphy Act 1949 as follows:

“In this Act the expression “wireless telegraphy” means the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy of a frequency not exceeding three million megacycles a second, being energy which either—

- (a) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not), or for the actuation or control of machinery or apparatus; or
- (b) is used in connection with the determination of position, bearing or distance, or for the gaining of information as to the presence, absence, position or motion of any object or of any objects of any class”

“Interference” is defined in section 19(4) of the Wireless Telegraphy Act 1949 as follows:

“In this Act, the expression ‘interference’, in relation to wireless telegraphy, means the prejudicing by any emission or reflection of electro-magnetic energy of the fulfilment of the purposes of the telegraphy (either generally or in part, and, without prejudice to the generality of the preceding words, as respects all, or as respects any, of the recipients or intended recipients of any message, sound or visual image intended to be conveyed by the telegraphy), and the expression ‘interfere’ shall be construed accordingly.”

Subsection (2) serves two purposes. It allows senior officers to issue notices relating to material possessed by more junior officers. It also ensures that the powers apply, for example, where the police do not possess material but have the power to search or inspect the material.

Clause 20 & 21: Modification of licences by the Director

The EC Telecommunications Services Licensing Directive (97/13/EC) requires licensing for telecommunications to be non-discriminatory. In practice this means that modifications usually need to be made to all licences of a particular type at the same time. However, the current licence modification procedure, as detailed under section 12 of the Telecommunications Act 1984, requires the Director General of Telecommunications (DGT) to obtain the written consent of an individual licence holder if he wishes to proceed with a modification without reference to the Competition Commission (CC). Thus if the DGT wishes to make a licence modification without reference to the CC, he must now obtain written consent from all those whose licences are to be modified. Given that there are a large number of individual licensees — well over 100 — gaining this consent is an unduly difficult requirement. For example, some licensees may feel they have insufficient interest to bother to answer the DGT’s letter. This could lead to licences becoming silted up with out of date requirements, as well as preventing the DGT from responding appropriately to new developments.

Clause 20 accordingly provides for the procedure for modifying telecommunications licences to allow for simultaneous modification of many licences. It aims to provide more responsive regulation and easier deregulation, while recognising the need for any new obligations facing substantial opposition to be examined by the CC. In particular, the Clause would enable the DGT to proceed without reference to the CC in cases where a proposed modification has general, but not unanimous, support or is deregulatory.

The Clause operates by making modifications to the existing section 12 of the Telecommunications Act 1984 (the 1984 Act) (which sets out the procedure for making modifications) and inserting a new section 12A (setting out the criteria for making modifications).

Subsection (1) provides that notice of modification, in addition to its being published, must be given to every “relevant licensee” (see the new section 12(6E), inserted by subsection (3)).

Subsection (2) replaces section 12(4) of the Telecommunications Act 1984 with two new subsections 4A and 4B. Subsection 4A provides that class licences (i.e. general authorisations, which are deemed to be granted to all those within a particular “class of persons” — e.g. every person in the UK — normally with no fee or registration involved) may be modified despite outstanding representations, provided that no objections come

from persons benefiting from the class licence. Subsection 4B paves the way for the criteria in Clause 12A which must be satisfied before a modification is made in the case of a licence granted to a particular person.

Subsection (3) inserts six new subsections in section 12 of the 1984 Act:

Subsections (6A) and (6B), requiring the reasons for the making of a licence modification to be published.

Subsection (6C), enabling the DGT to publish the names of companies objecting to a modification, without their consent, and to publish non-confidential details of objections and representations received.

Subsections (6D) and (6E), which provide definitions.

Subsection (6F) which makes clear that this procedure does not apply to a licence modification by a partial revocation

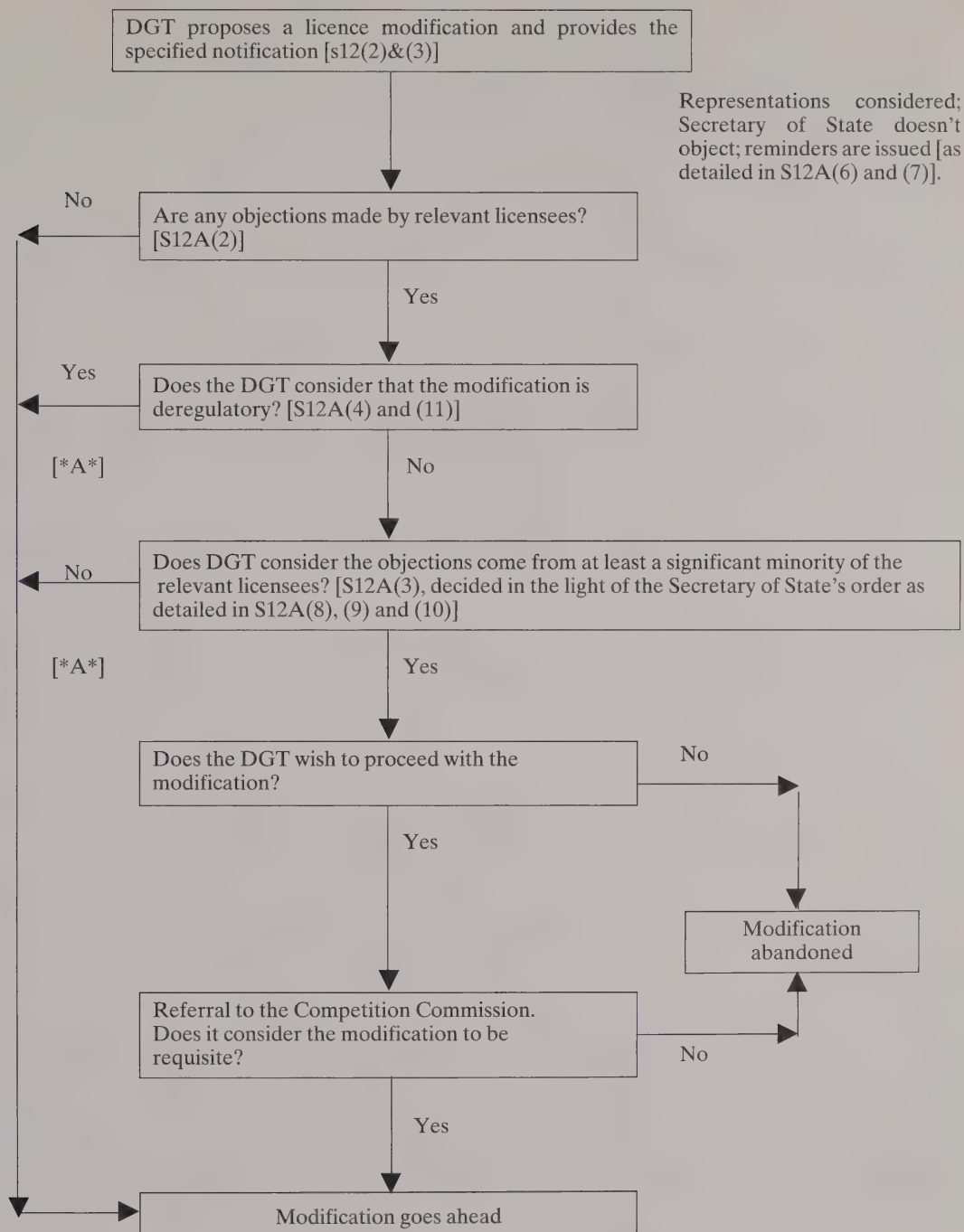
Subsection (4) inserts a new section 12A into the 1984 Act, which sets out the criteria for modifications to be made. This is illustrated in the flow-chart below.

Subsection 12A(5) provides that the modification may be made to licences issued since the making of a proposal for that modification, so long as the prospective licensee has been given opportunity to object and either has not done so or, if he had done so, would not have caused there to be a blocking minority of objections.

Subsections (5) and (6) make consequential amendments.

Figure 1 below provides a diagrammatic representation of the proposed revised licence modification procedure.

Part IV: Licence Modification Procedure



Clause 21: Appeals against modifications without the licensee's consent

Under the existing provisions of section 12 of the 1984 Act, any licensees whose licences are to be modified can force a reference to the Competition Commission if they are unhappy with the decision of the DGT to make the modification. This provides an appeal against licence modification proposals. Since the provisions of Clause 20 give the DGT new powers to modify licences even when there are objections raised by relevant licensees, there is now to be a balancing right of appeal on wider grounds than the normal grounds for judicial review. Clause 21 inserts a new section 12B into the 1984 Act, setting out the mechanism by which such an appeal can be made.

Clause 23: General interpretation

This Clause provides for the interpretation of various terms used throughout the Bill.

Subsection (1) inter alia defines:

electronic communications to include communications by means of a telecommunication system within the meaning of the Telecommunications Act 1984, or by other means but in electronic form.

Section 4(1) of the Telecommunications Act 1984 says

- * In this Act *telecommunications system* means a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy of—
 - (a) speech, music and other sounds
 - (b) visual images
 - (c) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or
 - (d) signals serving for the actuation or control of machinery or apparatus.

subordinate legislation as having the same meaning as in the Interpretation Act 1978, and also including certain statutory rules in Northern Ireland.

- * Section 21(1) of the Interpretation Act 1978 provides that subordinate legislation means Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act.

Clause 24: Short title, commencement, extent

Subsection (2) allows the Secretary of State to commence provisions on the Bill on such days as he may appoint. Different days may be appointed for different purposes.

Subsection (3) prevents the Secretary of State from bringing into force anything relating to authorising the Secretary of State to grant permission for the purposes in Schedule 1 until such time as the Tribunal mentioned in Schedule 1 has jurisdiction.

COMMENTARY ON SCHEDULES

Schedule 1: Persons Having the Appropriate Permission

Schedule 1 deals with the duration and types of appropriate permission which may empower a person to serve a notice under Clause 10 of this Bill requiring disclosure of information.

Paragraph 1: Data obtained under warrant

This paragraph deals with notices requiring disclosure, where the unintelligible information was obtained under a statutory power exercised in accordance with

- a warrant issued by the Secretary of State or a person holding judicial office; or
- an authorisation under Part III of the Police Act 1997.

Examples of legislation under which the Secretary of State may issue a warrant include the Interception of Communications Act 1985 and the Intelligence Services Act 1994. Examples of legislation under which a person holding judicial office may issue a warrant include the Police and Criminal Evidence Act 1984 and the Drug Trafficking Act 1994.

Sub-paragraph (2) states that the warrant or authorisation may empower a person to serve a notice requiring disclosure if

- the warrant or authorisation gave explicit permission for the notice to be given; or
- written permission has been given by the authority since the warrant or authorisation was issued.

The authority needed for the issue of a written notice requiring disclosure varies according to the power under which the material in question is obtained (see *sub-paragraphs (3) to (5)*).

Sub-paragraphs (6) to (8) describe those persons who may issue a warrant or authorisation under Clause 10.

In sub-paragraph (6)(c), an *authorising officer* within the meaning of Clause 93 of the Police Act 1997 means the Commissioner, a person appointed under that Act and who holds or has held high judicial office within the meaning of the Appellate Jurisdiction Act 1876 (for which see the explanatory notes on Clause 17).

Sub-paragraph (9) excludes from this paragraph unintelligible information

- which has been obtained under a statutory power without a warrant; and
- which has been obtained in the course of, or in connection with, an exercise of another power for which a warrant was required.

This might include, for example, cases where a constable has a right to enter premises under a warrant and while on the premises uncovers matter which he suspects to be evidence of a crime unrelated to the warrant itself, in accordance with e.g. Police and Criminal Evidence Act 1984 section 19.

Paragraph 2: Data obtained under statute but without a warrant

This paragraph deals with unintelligible information to which Paragraph 1 above does not apply, and which has come into the possession of any person as described under Clause 10(1)(a), (b) or (c) of this Bill (i.e., because the case does not involve a warrant issued by the Secretary of State or a person holding judicial office, or an authorisation under Part III of the Police Act 1997).

Paragraph 3: Data obtained without the exercise of statutory powers

This paragraph deals with unintelligible information that has come into the possession of an intelligence agency, the police or Customs and Excise by any other lawful means not involving the exercise of statutory powers.

Paragraph 4: General requirements relating to the appropriate permission

This paragraph makes some further stipulations about the categories of person who may be empowered to require disclosure. It also makes some stipulations about the permissions that may be given by members of the police, Customs and Excise and the armed forces.

Sub-paragraph (3) states that in the case of information which has come into the police's possession by means of powers to stop and search vehicles and pedestrians under the Prevention of Terrorism Act 1989, those able to authorise the serving of notice to disclose keys must be an officer of police of or above the rank specified in section 13A of that Act.

Section 13A of that Act specifies such ranks as:

- commander of the metropolitan police, as respects the metropolitan police area;
- commander of the City of London police, as respects the City of London; or
- assistant chief constable for any other police area.

Paragraph 5: Duration of permission

This paragraph provides for the duration of the validity of authorisations to serve a notice and prevents the issue of a notice after the authorisation has expired. The Bill does not require that a limit must be placed on the duration of an authorisation.

Paragraph 6: Formalities for permissions granted by the Secretary of State

Paragraph 6 states that any permissions granted by the Secretary of State in accordance with Schedule 1 may only be granted

- if signed by him personally; or
- if signed by a member of the Senior Civil Service and expressly authorised by the Secretary of State. The express authorisation must be in relation to that particular warrant (i.e. there can be no standing authorisation).

Schedule 2: The Tribunal

Schedule 2 provides for the constitution and functions of the Tribunal established under Clause 18.

Paragraph 1: Constitution of Tribunal

This paragraph determines the constitution of the Tribunal.

Sub-paragraph (1) ensures that members of the Tribunal may be drawn from the legal profession in all parts of the United Kingdom. The requirement of ten years' standing means that only those eligible for appointment to the judiciary can serve. These criteria and the subsequent provisions are essentially those for the IOCA Tribunal (Schedule 1 of the Interception of Communications Act 1985).

The Courts and Legal Services Act 1990 states that a person has a "general qualification" if he has a right of audience in relation to any class of proceedings in any part of the Supreme Court, or all proceedings in county courts or magistrates' courts.

Sub-paragraph (3) limits the term of office to 5 years. A member whose term of office expires is eligible for reappointment. Were he to serve a second time he would have to be re-appointed by further Letters Patent. There is no retirement age.

Sub-paragraph (4) provides the means whereby a member may resign.

Paragraph 2: President and Vice-President

Sub-paragraphs (1), (2) and (3) establish the positions of President and Vice-President who will be members of the Tribunal.

Paragraphs 3 to 5: Procedure of Tribunal etc.

Paragraph 3 *sub-paragraphs (1) to (6)* concern the rules under which the Tribunal will operate for hearing complaints. The rules are to be made by the Secretary of State, who is to ensure that complaints are properly considered while ensuring that information is not disclosed that would, for example, be prejudicial to national security.

Paragraph 4 states that the Tribunal's rules will be established by statutory instrument, a draft of which will first be laid before Parliament.

Paragraph 6 imposes a duty on persons to provide to the Tribunal any documents or information it may require in order that it may carry out its functions under Clause 18 of the Bill.

Paragraph 6: Appointment of special representatives

This provides for the appointment of persons (special representatives) whose function will be to represent the interests of an appellant in proceedings before the Tribunal from which he and any legal representative are excluded by virtue of the procedural rules set out in paragraph 3 above.

Sub-paragraph (2) defines who may be appointed to carry out the role of special representative.

Paragraph 7: Co-operation with Tribunal

This paragraph imposes a duty on persons to provide to the Tribunal any documents or information it may require in order that it may carry out its functions under Clause 18 of the Bill.

Paragraph 8: Appeals on points of law

This paragraph provides for an appeal to an appropriate appeal court (defined in *sub-paragraph 3*) on any question of law material to a final determination from the Tribunal.

Paragraph 9: Salaries and expenses

This paragraph deals with the payments of the members of the Tribunal and of its expenses.

Paragraph 10: Officers

Sub-paragraph (1) provides for the appointment of officers of the Tribunal by the Secretary of State, after consultation with the Tribunal. The Secretary of State may not therefore proceed unilaterally to make appointments. The provision itself places no limitation on the number of officers and (subject to the usual Treasury approval as to numbers) allows flexibility over the numbers, grades and individuals.

Sub-paragraph (2) enables an officer who is authorised by the Tribunal to obtain documents on the Tribunal's behalf.

Paragraph 11: Parliamentary Disqualification

The parts of the Schedules referred to in this paragraph list the bodies whose members are disqualified from membership of the House of Commons and the Northern Ireland Assembly respectively. They include Tribunals and public Boards, Commissions and Councils. Members of this Tribunal (as people paid for adjudicating in a quasi-judicial capacity on the decisions of Ministers, and able to overturn those decisions) clearly fall within the category of those who are normally disqualified.

FINANCIAL EFFECTS OF THE BILL

The approvals scheme under Part I would have no net impact on public expenditure because the Government intends that the fees would cover the cost of running the scheme. It is thought that Part II will result in significant savings, over time, as the option of electronic communication or storage is enabled for different purposes, and as greater use is made of electronic signatures. The Government does not envisage that significant public expenditure implications will arise from the new lawful access powers (Part III). The new licence modification procedure established by Part IV of this Bill is likely to reduce public expenditure by avoiding unnecessary Competition Commission references.

EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

The approvals scheme (Part I) is likely to result in a small increase in manpower. It is not envisaged that the law enforcement agencies will need an increase in manpower as a result of the powers provided for them in Part III.

REGULATORY IMPACT ASSESSMENT

Electronic Commerce

The provisions in Part II of the Bill are expected to lead to substantial savings for business in transacting with Government.

Cryptography Services Providers

The proposed approvals scheme for cryptography service providers is voluntary in nature and therefore whether or not a company seeks approval will be a business decision for it. Only those companies in the specialised sector of providing cryptography services will be directly affected and the total cost will be modest. The precise cost of approval will depend on the nature of the services a company may wish to be approved for and the scale of their business. There could also be marginal costs of meeting the standards required to gain approved status if these were set higher than the market required.

In deciding whether to seek approval a company will need to take account of the additional revenues which being approved might bring. Approved suppliers of some public-key certificates are likely to have a significant marketing advantage due to their certificates having legal recognition throughout the EU.

Law Enforcement

The objective of the new powers contained in Part III of the Bill is to ensure, as far as possible, that there is no overall reduction in the ability of the law enforcement, security and intelligence agencies to fight crime and threats to national security. Without these powers, there is a risk that criminal use of encryption will undermine the effectiveness of vital powers of interception and search and seizure.

The proposed new lawful access powers will apply to individuals and businesses alike. Costs will occur where persons are served with authorised written notices requiring the production of decryption keys or plaintext. Where the production of plaintext is deemed acceptable, compliance costs may be limited to the administrative costs of processing the notice and delivering up the required data. But where a notice specifies that a key be handed over, the individual/business served with a written notice may decide that their security has been compromised and may incur considerable costs in implementing new security systems or changing the keys of other trading partners, customers or associates.

Telecommunications Licences

The proposals on telecommunications licences principally impact only on those telecommunications operators who have individual licences. They will enable licence modifications which command general, though not unanimous, support in the industry, or those which are deregulatory, to be implemented without the need for a complex and expensive Competition Commission enquiry. The precise impact of these proposals will depend upon the nature of the modifications which may from time to time be proposed by Oftel, but the overall impact is likely to be deregulatory and to the extent that expensive competition commission references can be avoided, substantial savings could be made.

A full draft Regulatory Impact Assessment of the costs and benefits of the proposed Bill is available on the DTI Website www.dti.gov.uk/cii or from David Lee on 0207 215 1435.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement, before second reading, about the compatibility of the provisions of the Bill with the Conventions rights (as defined by section 1 of that Act). The Secretary of State for Trade and Industry made the following statement when publishing the draft Bill:

“In my view the provisions of the Electronic Communications Bill are compatible with the Convention rights”.

Extract from the Telecommunications Act 1984 showing words inserted at Section 12 by the Bill; it also shows other amendments made by the Bill (not highlighted)

Modification of licence conditions by agreement.

12 (1) Subject to the following provisions of this section, the Director may modify the conditions of a licence granted under section 7 above.

(2) Before making modifications under this section, the Director shall give notice—

- (a) stating that he proposes to make the modifications and setting out their effect;
- (b) stating the reasons why he proposes to make the modifications; and
- (c) specifying the time (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made.

(3) A notice under subsection (2) above shall be given by publication in such manner as the Director considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them and, in the case of a licence granted to a particular person, by sending a copy of the notice to every relevant licensee.

(4) Delete existing subsection and replace with:

(4A) In the case of a licence granted to all persons, or to all persons of a particular class, the Director shall not make any modification unless—

- (a) he has considered every representation made to him about the modification; and
- (b) there has not been any objection by a person running a telecommunication system under the authority of the licence to the making of the modification.

(4B) In the case of a licence granted to a particular person, the Director shall not make any modification unless—

- (a) he has considered every representation made to him about the modification or any modification in the same or similar terms that he is at the same time proposing to make in the case of other licences; and
- (b) the requirements of section 12A below are satisfied in the case of the modification and also in the case of every such modification in the same or similar terms.

(5) The Director shall also send a copy of a notice under subsection (2) above to the Secretary of State; and if, within the time specified in the notice, the Secretary of State directs the Director not to make any modification, the Director shall comply with the direction.

(6) The Secretary of State shall not give a direction under subsection (5) above unless—

- (a) it appears to him that the modification should be made, if at all, under section 15 below; or
- (b) it appears to him to be requisite or expedient to do so in the interests of national security or relations with the government of a country or territory outside the United Kingdom.

(6A) Where the Director makes a modification under this section, he shall, as soon as reasonably practicable after making the modification, give notice of—

- (a) his reasons for doing so; and
- (b) where the modification is made by virtue of subsection (3) of section 12A below, his reasons for determining that the condition in paragraph (c) of that subsection is fulfilled.

(6B) Subsection (3) above shall apply in the case of a notice under subsection (6A) above as it applies in the case of a notice under subsection (2) above.

(6C) Where the Director has given notice under subsection (2) above of a proposal to modify the conditions of a licence, he may in such manner and at such time as he considers appropriate publish—

- (a) the identities of any or all of the persons who objected to the making of the modification; and
- (b) to the extent that confidentiality for representations or objections in relation to the proposal for the modification has not been claimed by the persons making them, such other particulars of the representations or objections as he thinks fit.

(6D) In this section and section 12A below (except in subsection (6C) above), a reference to a representation or objection, in relation to a modification, is a reference only to a representation or objection which—

- (a) was duly made to the Director within a time limit specified in the case of that modification under subsection (2)(c) above or section 12A(6)(e) below; and
- (b) has not subsequently been withdrawn;

and for the purposes of this section and section 12A below representations against a modification shall be taken to constitute an objection only if they are accompanied by a written statement that they are to be so taken.

(6E) In this section and section 12A below ‘relevant licensee’, in relation to a modification, means—

- (a) in a case where the same or a similar modification is being proposed at the same time in relation to different licences granted to different persons, each of the persons who, at the time when notice of the proposals is given, is authorised by one or more of those licences to run a telecommunication system; and
- (b) in any other case, the person authorised by the licence in question to run such a system.

(6F) In this section references to making a modification of the conditions of a licence do not include references to the exercise of any power conferred by a term of the licence to revoke the licence in part or for particular purposes.

(7) References in this section and in sections 12A to 15 below to modifications of the conditions of a licence do not include references to modifications of conditions relating to the application of the telecommunications code.

Electronic Communications Bill

ARRANGEMENT OF CLAUSES

PART I

CRYPTOGRAPHY SERVICE PROVIDERS

Clause

1. Register of approved providers. [j101]
2. Arrangements for the grant of approvals. [j101a]
3. Delegation of approval functions. [j106]
4. Restrictions on disclosure of information. [j112]
5. Regulations under Part I. [j109]
6. Provision of cryptography support services. [j110]

PART II

FACILITATION OF ELECTRONIC COMMERCE, DATA STORAGE, ETC.

7. Electronic signatures and related certificates. [j412]
8. Power to modify legislation. [j410]
9. Section 8 orders. [j411]

PART III

INVESTIGATION OF PROTECTED ELECTRONIC DATA

Power to require disclosure of key

10. Notices requiring disclosure. [j201]
11. Disclosure of information in place of key. [j201A]

Offences

12. Failure to comply with a notice. [j202]
13. Tipping-off. [j203]
14. Provisions supplemental to ss. 12 and 13. [j203A]

Safeguards

15. General duties of specified authorities. [j204]
16. Code of practice. [j205]
17. The Commissioner. [j206]
18. The Tribunal. [j207]

Supplemental provisions of Part III

Clause

19. Interpretation of Part III. [j210]

PART IV

MISCELLANEOUS AND SUPPLEMENTAL

Telecommunications licences

20. Modification of licences by the Director. [j301A]
21. Appeals against modifications without the licensee's consent. [J301B]

Supplemental

22. Ministerial expenditure etc. [j503]
23. General interpretation. [j505]
24. Short title, commencement, extent. [j510]

SCHEDULES:

- Schedule 1 —Persons having the appropriate permission [j201S].
Schedule 2 —The Tribunal [j207s].

A

B I L L

TO

Make provision to facilitate the use of electronic communications and electronic data storage; to confer powers to require the disclosure of data needed to obtain access to electronic information or to make it intelligible; to make provision about the modification of licences granted under section 7 of the Telecommunications Act 1984; and for connected purposes. A.D. 1999.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5

PART I

CRYPTOGRAPHY SERVICE PROVIDERS

1.—(1) It shall be the duty of the Secretary of State to establish and maintain a register of approved providers of cryptography support services. Register of approved providers. [j101]

10 (2) The Secretary of State shall secure that the register contains particulars of every person who is for the time being approved under any arrangements in force under section 2.

(3) The particulars that must be recorded in every entry in the register relating to an approved person are—

- 15 (a) the name and address of that person;
- (b) the services in respect of which that person is approved; and
- (c) the conditions of the approval.

(4) It shall be the duty of the Secretary of State to ensure that such arrangements are in force as he considers appropriate for—

- 20 (a) allowing members of the public to inspect the contents of the register; and
- (b) securing that such publicity is given to any withdrawal or modification of an approval as will bring it to the attention of persons likely to be interested in it.

PART I
Arrangements for
the grant of
approvals. [j101a]

2.—(1) It shall be the duty of the Secretary of State to secure that there are arrangements in force for granting approvals to persons who—

- (a) are or are proposing to provide cryptography support services in the United Kingdom; and
- (b) seek approval in respect of any such services that they are providing, or are proposing to provide, whether in the United Kingdom or elsewhere. 5

(2) The arrangements must—

- (a) allow for an approval to be granted either in respect of all the services in respect of which it is sought or in respect of only some of them; 10
- (b) ensure that an approval is granted to a person in respect of any services only if subsection (3) applies in that person's case;
- (c) provide for an approval granted to any person to have effect subject to such conditions (whether or not connected with the provision of the services in respect of which the approval is granted) as may be contained in the approval; 15
- (d) enable a person to whom the Secretary of State is proposing to grant an approval to refuse it if the proposal is in different terms from the approval which was sought; 20
- (e) make provision for the handling of complaints and disputes which—
 - (i) fall to be dealt with in accordance with a procedure maintained by an approved person in accordance with the conditions of his approval; but
 - (ii) have failed to be disposed of by the application of that procedure; 25
- (f) provide for the modification and withdrawal of approvals.

(3) This subsection applies in a person's case if the Secretary of State is satisfied that that person—

- (a) will comply, in providing the services in respect of which he is approved, with such technical and other requirements as may be prescribed; 30
- (b) is a person in relation to whom such other requirements as may be prescribed are, and will continue to be, satisfied;
- (c) is, and will continue to be, able and willing to comply with any requirements that the Secretary of State is proposing to impose by means of conditions of the approval; and 35
- (d) is otherwise a fit and proper person to be approved in respect of those services. 40

(4) Regulations made by virtue of paragraph (a) or (b) of subsection (3) may frame a requirement for the purposes of that subsection by reference to the opinion of a person specified in the regulations, or of a person chosen in a manner determined in accordance with the regulations.

(5) The requirements that may be imposed by conditions contained in an approval in accordance with the arrangements include— 45

- (a) requirements to provide information to such persons, in such form, at such times and in response to such requests as may be specified in or determined under the terms of the condition;

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(b) requirements that impose obligations that will continue or recur notwithstanding the withdrawal (in whole or in part) of the approval;

5 (c) requirements framed by reference to the opinion or directions of a person specified in or chosen in accordance with provision contained in the conditions.

(6) Any requirement to provide information that is imposed in accordance with the arrangements on any person by the conditions of his approval shall be enforceable at the suit or instance of the Secretary of State.

10 (7) Where any arrangements under this section so provide, a person who—

(a) seeks an approval under the arrangements,

(b) applies for a modification of such an approval,

(c) is for the time being approved under the arrangements, or

15 (d) has his approval under the arrangements modified wholly or partly in consequence of an application made by him,

shall pay to the Secretary of State, at such time or times as may be prescribed, such fee or fees as may be prescribed in relation to that time or those times.

20 (8) *Sums received by the Secretary of State by virtue of subsection (7) shall be paid into the Consolidated Fund.*

3.—(1) The Secretary of State may appoint any person to carry out, in his place, such of his functions under the preceding provisions of this Part (other than any power of his to make regulations) as may be specified in the

Delegation of approval functions. [j106]

25 appointment.

(2) An appointment under this section—

(a) shall have effect only to such extent, and subject to such conditions, as may be set out in the appointment; and

30 (b) may be revoked or varied at any time by a notice given by the Secretary of State to the appointed person.

(3) A person appointed under this section shall, in the carrying out of the functions specified in his appointment, comply with all such general directions as may be given to him from time to time by the Secretary of State.

35 (4) Subject to any order under subsection (5) and to any directions given by the Secretary of State, where a body established by or under any enactment or the holder of any office created by or under any enactment is appointed to carry out any functions of the Secretary of State under this Part—

40 (a) the enactments relating to the functions of that body or office shall have effect as if the functions of that body or office included the functions specified in the appointment; and

45 (b) the body or office-holder shall be taken to have power to do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the functions so specified.

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(5) The Secretary of State may, by order made by statutory instrument, provide for enactments relating to any such body or office as is mentioned in subsection (4) to have effect, so far as appears to him appropriate for purposes connected with the carrying out of functions that have been or may be conferred on the body or office-holder under this section, with such modifications as may be provided for in the order. 5

(6) An order shall not be made under subsection (5) unless a draft of it has first been laid before Parliament and approved by a resolution of each House.

(7) It shall be the duty of the Secretary of State to secure—

- (a) that any appointment made under this section is published in such manner as he considers best calculated to bring it to the attention of persons likely to be interested in it; 10
- (b) that any variation or revocation of such an appointment is also so published; and
- (c) that the time fixed for any notice varying or revoking such an appointment to take effect allows what appears to him to be a reasonable period after the giving of the notice for the making of any necessary incidental or transitional arrangements. 15

(8) Nothing in this section, or in anything done under this section, shall prejudice— 20

- (a) any power of the Secretary of State, apart from this Act, to exercise functions through a Minister or official in his department;
- (b) any power of any person by virtue of subsection (4), or by virtue of an order under subsection (5), to act on behalf of a body or office-holder in connection with the carrying out of any function; 25
- (c) any provision by virtue of section 2(4) or (5)(c) that imposes a requirement by reference to the opinion of any person or determines the manner of choosing a person whose opinion is to be referred to.

Restrictions on
disclosure of
information.
[j112]

4.—(1) Subject to the following provisions of this section, no information which— 30

- (a) has been obtained under or by virtue of the provisions of this Part, and
- (b) relates to the private affairs of any individual or to any particular business, 35

shall, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business.

(2) Subsection (1) does not apply to any disclosure of information which is made— 40

- (a) for the purpose of facilitating the carrying out of any functions under this Part, or any prescribed functions, of the Secretary of State or a person appointed under section 3;
- (b) for the purpose of facilitating the carrying out of any functions of a local weights and measures authority in Great Britain; 45
- (c) for the purpose of facilitating the carrying out of prescribed functions of any prescribed person;

(d) in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings;

(e) for the purposes of any civil proceedings which—

(i) relate to the provision of cryptography support services; and

(ii) are proceedings to which a person approved in accordance with arrangements under section 2 is a party;

(f) for the purposes of any proceedings before the Tribunal established under section 18; or

(g) in pursuance of a Community obligation.

(3) In subsection (2)(a) the reference to functions under this Part does not include a reference to any power of the Secretary of State to make regulations.

(4) If information is disclosed to the public in circumstances in which the disclosure does not contravene this section, this section shall not prevent its further disclosure by any person.

(5) Any person who discloses any information in contravention of this section shall be guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or to both.

5.—(1) In this Part “prescribed” means prescribed by regulations made by the Secretary of State, or determined in such manner as may be provided for in any such regulations.

Regulations under Part I. [j109]

(2) The powers of the Secretary of State to make regulations under this Part shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Regulations made by the Secretary of State under any provision of this Part—

(a) may make different provision for different cases; and

(b) may contain such incidental, supplemental, consequential and transitional provision as the Secretary of State thinks fit.

6.—(1) In this Part “cryptography support service” means any service which is provided to the senders or recipients of electronic communications, or to those storing electronic data, and is designed to facilitate the use of encryption—

Provision of cryptography support services. [j110]

(a) for securing that such communications or data can be accessed, or can be put into an intelligible form, only by certain persons; or

(b) for securing that the authenticity or integrity of such communications is capable of being ascertained.

(2) References in this Part to the provision of a cryptography support service include references to the supply of, or of any right to use, computer software or computer hardware if, and only if, the supply is intended to be no more than incidental to the provision by the same person of cryptography support services not consisting in such a supply.

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(3) For the purposes of this Part cryptography support services are provided in the United Kingdom if—

- (a) they are provided from premises in the United Kingdom;
- (b) they are provided to a person who is in the United Kingdom when he makes use of the services; or
- (c) they are provided to a person who makes use of the services for the purposes of a business carried on in the United Kingdom or from premises in the United Kingdom.

5

PART II

FACILITATION OF ELECTRONIC COMMERCE, DATA STORAGE, ETC.

10

Electronic
signatures and
related certificates.
[j412]

7.—(1) In any legal proceedings—

- (a) an electronic signature incorporated or logically associated with a particular electronic communication, and
- (b) the certification by any person of such a signature,

shall each be admissible in evidence in relation to any question as to the authenticity of the communication or its integrity.

15

(2) For the purposes of this section an electronic signature is so much of anything in electronic form as—

- (a) is incorporated into or otherwise logically associated with an electronic communication; and
- (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or its integrity, or both.

20

(3) For the purposes of this section an electronic signature incorporated into or associated with a particular electronic communication is certified by any person if that person (whether before or after the making of the communication) has certified either—

25

- (a) the signature, or
- (b) a procedure to be applied to the signature,

as a valid means of establishing the authenticity of the communication or its integrity, or both.

30

Power to modify
legislation. [j410]

8.—(1) Subject to subsection (3), the appropriate Minister may by order made by statutory instrument modify the provisions of any enactment or subordinate legislation in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage (instead of other forms of communication or storage) for any purpose mentioned in subsection (2).

35

(2) Those purposes are—

- (a) the doing of anything which under those provisions is to be or may be done in writing or otherwise using a document, notice or instrument;
- (b) the doing of anything which under those provisions is to be or may be done by post or other specified means of delivery;

40

(c) the doing of anything which under those provisions is to be or may be authorised by a person's signature or seal, or is required to be witnessed;

5 (d) the making of any statement or declaration which under those provisions is required to be made under oath or to be contained in a statutory declaration;

(e) the keeping, maintenance or preservation, for the purposes or in pursuance of those provisions, of any account, record, notice, instrument or other document;

10 (f) the provision, production or publication under those provisions of any information or other matter;

(g) the making of any payment that is to be or may be made under those provisions.

15 (3) The appropriate Minister shall not make an order under this section authorising the use of electronic communications or electronic storage for any purpose unless he is satisfied that the authorisation is such that it will be possible for a record to be produced of everything that is done by virtue of the authorisation.

20 (4) Without prejudice to the generality of subsection (1), the power to make an order under this section shall include power to make an order containing any of the following provisions—

(a) provision as to the electronic form to be taken by any electronic communications or electronic storage the use of which is authorised by an order under this section;

25 (b) provision imposing conditions subject to which the use of electronic communications or electronic storage is so authorised;

30 (c) provision, in relation to cases in which any such conditions are not satisfied, for treating anything for the purposes of which the use of such communications or storage is so authorised as not having been done;

(d) provision, in relation to cases in which the use of electronic communications or electronic storage is so authorised, for the determination of any of the matters mentioned in subsection (5), or as to the manner in which they may be proved in legal proceedings;

35 (e) provision, in relation to cases in which fees or charges are or may be imposed in connection with anything for the purposes of which the use of electronic communications or electronic storage is so authorised, for different fees or charges to apply where use is made of such communications or storage;

40 (f) provision, in connection with anything so authorised, for a person to be able to refuse to accept receipt of something in electronic form except in such circumstances as may be specified in or determined under the order;

45 (g) provision, in connection with any use of electronic communications so authorised, for intermediaries to be used, or to be capable of being used, for the transmission of any data or for establishing the authenticity or integrity of any data;

(h) provision, in connection with any use of electronic storage so authorised, for persons satisfying such conditions as may be

PART II

specified in or determined under the regulations to carry out functions in relation to the storage;

- (i) provision requiring persons to prepare and keep records in connection with any use of electronic communications or electronic storage which is so authorised; 5
 - (j) provision requiring the production of the contents of any records kept in accordance with an order under this section;
 - (k) provision for a requirement imposed by virtue of paragraph (i) or (j) to be enforceable at the suit or instance of such person as may specified in or determined in accordance with the order. 10
- (5) The matters referred to in subsection (4)(d) are—
- (a) whether a thing has been done using an electronic communication or electronic storage;
 - (b) the time at which, or date on which, a thing done using any such communication or storage was done; 15
 - (c) the person by whom such a thing was done; and
 - (d) the contents, authenticity or integrity of any electronic data.
- (6) An order under this section—
- (a) shall not (subject to paragraph (b)) require the use of electronic communications or electronic storage for any purpose; but 20
 - (b) may impose restrictions on, or conditions in relation to, the variation or withdrawal of any election or other decision to make use of such communications or storage in relation to any matter.

(7) The matters in relation to which provision may be made by an order under this section do not include any matter under the care and management of the Commissioners of Inland Revenue or any matter under the care and management of the Commissioners of Customs and Excise. 25

Section 8 orders.
[j411]

9.—(1) In this Part “the appropriate Minister” means (subject to subsections (2) and (7))—

- (a) in relation to any matter with which a department of the Secretary of State is concerned, the Secretary of State; 30
- (b) in relation to any matter with which the Treasury is concerned, the Treasury; and
- (c) in relation to any matter with which any Government department other than a department of the Secretary of State or the Treasury is concerned, the Minister in charge of the other department. 35

(2) Where in the case of any matter—

- (a) that matter falls within more than one paragraph of subsection (1),
- (b) there is more than one such department as is mentioned in paragraph (c) of that subsection that is concerned with that matter, or 40
- (c) both paragraphs (a) and (b) of this subsection apply,

references, in relation to that matter, to the appropriate Minister are references to any one or more of the appropriate Ministers acting (in the case of more than one) jointly.

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(3) Subject to subsection (4), a statutory instrument containing an order under section 8 shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Subsection (3) does not apply in the case of an order a draft of which has been laid before Parliament and approved by a resolution of each House.

(5) An order under section 8 may—

- (a) provide for any conditions or requirements imposed by such an order to be framed by reference to the directions of such persons as may be specified in or determined in accordance with the order;
- (b) provide that any such condition or requirement is to be satisfied only where a person so specified or determined is satisfied as to specified matters.

(6) The provision made by such an order may include—

- (a) different provision for different cases;
- (b) such exceptions and exclusions as the appropriate Minister may think fit; and
- (c) any such incidental, supplemental, consequential and transitional provision as he may think fit.

(7) In the application of this section and section 8 to Scotland—

- (a) any power of the appropriate Minister to make an order under section 8 may also be exercised by the Scottish Ministers with the consent of the appropriate Minister; and
- (b) where the Scottish Ministers make an order under section 8—
 - (i) subsection (2) of this section applies only for the purposes of the giving of consent by the appropriate Minister;
 - (ii) any reference to the appropriate Minister in that section or in subsections (3) to (6) of this section shall be construed as a reference to the Scottish Ministers; and
 - (iii) any reference to Parliament or to a House of Parliament shall be construed as a reference to the Scottish Parliament.

PART III

INVESTIGATION OF PROTECTED ELECTRONIC DATA

Power to require disclosure of key

10.—(1) This section applies where any protected information—

Notices requiring disclosure. [j201]

- (a) has come, or is likely to come, into the possession of any person by means of the exercise of a statutory power to seize, detain, inspect, search or otherwise to interfere with documents or other property;
- (b) has come, or is likely to come, into the possession of any person by means of the exercise of a statutory power to intercept communications or to interfere with wireless telegraphy;
- (c) has come into the possession of any person as a result of having been provided or disclosed in pursuance of any statutory duty (whether or not one arising as a result of a request for information); or
- (d) has, by any other lawful means not involving the exercise of statutory powers, come into the possession of an intelligence agency, the police or the customs and excise.

PART III

(2) If it appears to any person with the appropriate permission under Schedule 1 that a key to the protected information—

(a) is in the possession of any person, and

(b) cannot reasonably be obtained by the person with that permission without the giving of a notice under this section, 5

the person with that permission may, by notice to the person appearing to him to have possession of the key, require the disclosure of the key.

(3) A notice under this section requiring the disclosure of any key—

(a) must be given in writing or (if not in writing) must be given in a way that produces a record of its having been given; 10

(b) subject to paragraph (a), may take such form and be given in such manner as the person giving it thinks fit; and

(c) must specify the manner in which, and time by which, the disclosure is to be made.

(4) A notice under this section shall not require the disclosure of a key to 15 any person other than—

(a) the person giving the notice; or

(b) such other person as may be specified in or otherwise identified by, or in accordance with, the provisions of the notice.

(5) A notice under this section shall not require the disclosure of any key 20 which—

(a) is intended to be used for the purpose only of generating electronic signatures; and

(b) has not in fact been used for any other purpose.

(6) Schedule 1 (definition of the appropriate permission) shall have effect. 25

(7) This section and that Schedule are without prejudice to any power to acquire a key to protected information otherwise than under this Act.

Disclosure of
information in
place of key.
[j201A]

11.—(1) Subsection (2) applies where—

(a) a person is required by a section 10 notice to disclose a key to any protected information; and 30

(b) compliance with the requirement by the provision of the information in an intelligible form is authorised for the purposes of this section.

(2) The person required to disclose the key—

(a) may use it to obtain access to the protected information, or to put that information into an intelligible form; and 35

(b) shall be taken for the purposes of this Part to have complied with the requirement to disclose the key if, by the time by which he is required to disclose it to any person, he has instead provided that person with the information in an intelligible form.

(3) Compliance with a requirement to disclose a key to protected 40 information by the provision of the information in an intelligible form is authorised for the purposes of this section unless—

(a) a person who for the purposes of Schedule 1 granted the permission for the giving of a section 10 notice in relation to that information, or

- (b) a person whose permission for the giving of a such a notice in relation to that information would constitute the appropriate permission under that Schedule,

PART III

has given a direction that the requirement can be complied with only by the disclosure of the key itself.

Offences

12.—(1) A person is guilty of an offence if he fails to comply, in accordance with any section 10 notice, with any requirement of that notice to disclose a key to protected information.

Failure to comply with a notice.
[j202]

(2) In proceedings against any person for an offence under this section, it shall be a defence (subject to subsection (4)) for that person to show—

(a) that the key was not in his possession after the giving of the notice and before the time by which he was required to disclose it; but

(b) that he did, before that time, make a disclosure, to the person to whom he was required to disclose the key, of all such information in his possession as was required by that person to enable possession of the key to be obtained.

(3) In proceedings against any person for an offence under this section it shall be a defence (subject to subsection (4)) for that person to show—

(a) that it was not reasonably practicable for him to make a disclosure of the key before the time by which he was required to do so;

(b) where the key was not in his possession at that time, that it was not reasonably practicable for him, before that time, to make such a disclosure as is mentioned in subsection (2)(b); and

(c) that as soon after that time as it was reasonably practicable for him to make a disclosure of the key or (if earlier) of sufficient information to enable possession of the key to be obtained, he made such a disclosure to the person to whom he was required to disclose the key.

(4) Except in a case where there is no authorisation for the purposes of section 11, in proceedings for an offence under this section a person shall have a defence under subsection (2) or (3) only if he also shows that it was not reasonably practicable for him to comply with the requirement in the manner allowed by that section.

13.—(1) This section applies where a section 10 notice contains a provision requiring—

Tipping-off. [j203]

(a) the person to whom the notice is given, and

(b) every other person who becomes aware of it or of its contents, to keep secret the giving of the notice, its contents and the things done in pursuance of it.

(2) A person who makes a disclosure to any other person of anything that he is required by the notice to keep secret shall be guilty of an offence.

(3) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that—

(a) the disclosure was effected entirely by the operation of software designed to indicate when a key to protected information has ceased to be secure; and

PART III

- (b) that person could not reasonably have been expected to take steps, after being given the notice or (as the case may be) becoming aware of it or of its contents, to prevent the disclosure.

(4) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that— 5

- (a) the disclosure was made by or to a professional legal adviser in connection with the giving of advice by the adviser to any client of his; and

- (b) the person to whom or, as the case may be, by whom it was made was the client or a representative of the client. 10

(5) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that the disclosure was made by a legal adviser in contemplation of, or in connection with or for the purposes of, any proceedings before a court or tribunal. 15

(6) Neither subsection (4) nor subsection (5) applies in the case of a disclosure made with a view to furthering any criminal purpose.

(7) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that the disclosure was authorised by or on behalf of either the person who gave 20 the notice or a person who—

- (a) is in possession of the protected information to which the notice relates; and

- (b) came into possession of that information as mentioned in section 10(1). 25

(8) In proceedings for an offence under this section against a person other than the person to whom the notice was given, it shall be a defence for the person against whom the proceedings are brought to show that he neither knew nor had reasonable grounds for suspecting that the notice contained a requirement to keep secret what was disclosed. 30

Provisions
supplemental to ss.
12 and 13. [j203A]

14.—(1) A person guilty of an offence under section 12 shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or to both;
- (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to 35 both.

(2) A person guilty of an offence under section 13 shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine, or to both;
- (b) on summary conviction, to imprisonment for a term not exceeding 40 six months or a fine not exceeding the statutory maximum, or to both.

1985 c. 56.

(3) In section 9(4) of the Interception of Communications Act 1985 (offences in proceedings for which the restriction on the admissibility of evidence of warrant etc. is not to apply) after paragraph (bb) there shall be 45 inserted—

“(bc) an offence under section 12 or 13 of the Electronic Communications Act 1999;”.

Safeguards

PART III

15.—(1) This section applies to—

General duties of
specified
authorities. [j204]

(a) the Secretary of State and every other Minister of the Crown in charge of a government department;

5 (b) every chief officer of police;

(c) the Commissioners of Customs and Excise; and

(d) every person whose officers or employees include persons with duties that involve the giving of section 10 notices.

(2) It shall be the duty of each of the persons to whom this section applies to
10 ensure, in relation to persons under his control who obtain possession of keys to protected information by means of the exercise of powers conferred by this Part, that such arrangements are in force as he considers necessary for securing—

15 (a) that a key disclosed in pursuance of a section 10 notice is used for obtaining access to, or putting into an intelligible form, only the protected information in relation to which the power to give the notice was exercised;

20 (b) that the uses to which a key so disclosed is put, and the consequences of the use of the key, are reasonable and proportionate having regard to the uses to which the person using the key is entitled to put the protected information to which it relates;

(c) that the requirements of subsection (3) are satisfied in relation to any key so disclosed;

25 (d) that all records of a key so disclosed are destroyed as soon as the key is no longer needed for the purposes for which its disclosure was required.

(3) The requirements of this subsection are satisfied in relation to any key disclosed in pursuance of a section 10 notice if—

30 (a) the number of persons to whom the key is disclosed or otherwise made available, and

(b) the number of copies made of the key,

are each limited to the minimum that is necessary for the purposes for which its disclosure was required.

35 (4) In this section “chief officer of police” means any of the following—

(a) the chief constable of a police force maintained under or by virtue of section 2 of the Police Act 1996 or section 1 of the Police (Scotland) Act 1967;

1996 c. 16.
1967 c. 77.

(b) the Commissioner of Police of the Metropolis;

40 (c) the Commissioner of Police for the City of London;

(d) the Chief Constable of the Royal Ulster Constabulary;

(e) the Director General of the National Criminal Intelligence Service;

(f) the Director General of the National Crime Squad.

16.—(1) The Secretary of State shall issue a code of practice in connection
45 with the exercise or performance by persons (other than the Commissioner and the Tribunal) of their powers and duties under this Part.

Code of practice.
[j205]

PART III

(2) Before issuing a code of practice under subsection (1), the Secretary of State shall—

(a) prepare and publish a draft of that code; and

(b) consider any representations made to him about the draft;

and the Secretary of State may incorporate in the code finally issued any modifications made by him to the draft after its publication. 5

(3) The Secretary of State shall lay before both Houses of Parliament any draft code of practice prepared by him under this section.

(4) A code of practice issued by the Secretary of State under this section shall not be brought into force except in accordance with an order made by the Secretary of State by statutory instrument. 10

(5) A statutory instrument containing an order under subsection (4) shall not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

(6) An order under subsection (4) may contain such transitional provisions and savings as appear to the Secretary of State to be necessary or expedient in connection with the bringing into force of the code brought into force by that order. 15

(7) The Secretary of State may from time to time—

(a) revise the whole or any part of a code issued under this section; and 20

(b) issue the revised code.

(8) Subsections (2) to (6) shall apply (with appropriate modifications) in relation to the issue of any revised code under this section as they apply in relation to the first issue of such a code.

(9) A person exercising or performing any power or duty under this Part shall, in so doing, have regard to the code of practice for the time being in force under this section. 25

(10) A failure on the part of any person to comply with any provision of the code of practice for the time being in force under this section shall not of itself render him liable to any criminal or civil proceedings. 30

(11) The code of practice in force at any time under this section shall be admissible in evidence in any criminal or civil proceedings; and, if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings in relation to a time when it was in force, it shall be taken into account in determining that question. 35

The
Commissioner.
[j206]

1876 c. 59.

17.—(1) The Prime Minister shall appoint a person who holds or has held a high judicial office (within the meaning of the Appellate Jurisdiction Act 1876) to carry out the functions of—

(a) keeping under review the exercise and performance by the Secretary of State of his powers and duties under this Part; 40

(b) keeping under review the adequacy of the arrangements by reference to which the Secretary of State seeks to discharge his duty under section 15; and

- (c) giving to the Tribunal all such assistance as the Tribunal may require for the purpose of enabling them to carry out their functions under this Part.

(2) The Commissioner shall hold office in accordance with the terms of his appointment; *and there shall be paid to him out of money provided by Parliament such allowances as the Treasury may determine.*

(3) It shall be the duty of—

- (a) every person holding office under the Crown,
- (b) every member of an intelligence agency,
- 10 (c) every official of a government department,
- (d) every person engaged in the business of the Post Office or in the running of a public telecommunication system (within the meaning of the Telecommunications Act 1984),
- (e) every person by or to whom a section 10 notice has been given, and
- 15 (f) every officer or employee of a person whose officers or employees include persons with duties that involve the giving of section 10 notices,

1984 c. 12.

to disclose or provide to the Commissioner such documents and information as he may require for the purpose of enabling him to carry out his functions under this section.

(4) If at any time it appears to the Commissioner—

- (a) that there has been a contravention of the provisions of this Part which has not been the subject of a report made by the Tribunal under section 18(4), or
- 25 (b) that any arrangements by reference to which the Secretary of State has sought to discharge his duty under section 15 have proved inadequate,

he shall make a report to the Prime Minister with respect to that contravention or those arrangements.

30 (5) As soon as practicable after the end of each calendar year, the Commissioner shall make a report to the Prime Minister with respect to the carrying out of his functions under this section.

(6) The Prime Minister shall lay before each House of Parliament a copy of every annual report made by the Commissioner under subsection (5), together with a statement as to whether any matter has been excluded from that copy in pursuance of subsection (7).

(7) If it appears to the Prime Minister, after consultation with the Commissioner, that the publication of any matter in an annual report would be contrary to the public interest or prejudicial to—

- 40 (a) national security,
 - (b) the prevention or detection of serious crime,
 - (c) the economic well-being of the United Kingdom, or
 - (d) the continued discharge of the functions of any intelligence agency,
- the Prime Minister may exclude that matter from the copy of the report as laid before each House of Parliament.

PART III
The Tribunal.
[j207]

1985 c. 56.

18.—(1) There shall be a tribunal for hearing the following complaints—

- (a) complaints about the manner in which functions under this Part are carried out in relation to cases in which the permission of the Secretary of State is required for the giving of a section 10 notice; and
- (b) complaints that a person has suffered detriment as a consequence of any prohibition or restriction, by virtue of section 9 of the Interception of Communications Act 1985 (matters of which evidence cannot be adduced), on his relying in any proceedings before a court or tribunal on anything done under this Part or on any contravention of this Part.

(2) If—

- (a) an interested party makes a complaint to the Tribunal in respect of a section 10 notice for the giving of which the permission of the Secretary of State was or should have been granted under this Part, and
- (b) the complaint is not one appearing to the Tribunal to be frivolous or vexatious,

the Tribunal shall hear and determine the complaint.

(3) Subject to rules under paragraph 3(1)(f) of Schedule 2, the Tribunal shall have power, on determining a complaint under this section, to make such award of compensation or other order as they think fit.

(4) On making a determination under this section, the Tribunal shall send a report of their determination—

- (a) in a case in which they have determined that the Secretary of State has failed to carry out his functions in relation to a section 10 notice in accordance with the provisions of this Part, to the Prime Minister; and
- (b) in any case, to the Commissioner.

(5) Section 9 of the Interception of Communications Act 1985 shall not apply to proceedings before the Tribunal.

(6) Schedule 2 (which makes provision about the constitution and procedure of the Tribunal) shall have effect.

(7) In this section “interested party” means a person who—

- (a) is or has been in possession of any protected information the key to which has been required to be disclosed in pursuance of a section 10 notice, or a notice purporting to be such a notice;
- (b) has been required by a section 10 notice, or a notice purporting to be such a notice, to disclose any key to protected information; or
- (c) is or has been subject to any prohibition or restriction, by virtue of section 9 of the Interception of Communications Act 1985, on his relying in any proceedings before a court or tribunal on anything done under of this Part or on any contravention of this Part.

Supplemental provisions of Part III

Interpretation of
Part III. [j210]

19.—(1) In this Part—

“the Commissioner” means the Commissioner appointed under section 17;

“the customs and excise” means any person commissioned by the Commissioners of Customs and Excise;

“electronic signature” means anything in electronic form which—

(a) is incorporated into, or otherwise logically associated with, any electronic data;

(b) is generated by the signatory or other source of the data; and

(c) is used for the purpose of facilitating, by means of a link between the signatory or other source and the data, the establishment of the authenticity or integrity of the data, or of both;

“GCHQ” has the same meaning as in the Intelligence Services Act 1994; 1994 c. 13.

“Her Majesty’s forces” has the same meaning as in the Army Act 1955; 1955 c. 18.

“intelligence agency” means the Security Service, the Secret Intelligence Service or GCHQ;

“key”, in relation to any electronic data, means any code, password, algorithm, key or other data the use of which (with or without other keys)—

(a) allows access to the electronic data, or

(b) facilitates the putting of the data into an intelligible form;

“the police” means—

(a) any constable;

(b) the Commissioner of Police of the Metropolis or any Assistant Commissioner of Police of the Metropolis;

(c) the Commissioner of Police for the City of London;

“protected information” means any electronic data which, without the key to the data—

(a) cannot, or cannot readily, be accessed, or

(b) cannot, or cannot readily, be put into an intelligible form;

“section 10 notice” means a notice under section 10;

“statutory”, in relation to any power or duty, means conferred or imposed by or under any enactment or subordinate legislation;

“the Tribunal” means the Tribunal established under section 18;

“warrant” includes any instrument (however described) which has an effect equivalent to that of a warrant;

“wireless telegraphy” and, in relation to wireless telegraphy, “interfere” have the same meanings as in the Wireless Telegraphy Act 1949. 1949 c. 54.

(2) References in this Part to a person’s having protected information in his possession include references—

(a) to its being in the possession of a person who is under his control so far as that information is concerned; and

(b) to its being, or being contained in, anything which he or a person under his control is entitled, in exercise of any statutory power and without otherwise taking possession of it, to detain, inspect or search.

PART IV

MISCELLANEOUS AND SUPPLEMENTAL

Telecommunications licences

Modification of
licences by the
Director. [j301A]
1984 c. 12.

20.—(1) In subsection (3) of section 12 of the Telecommunications Act 1984 (which requires notice of a proposed modification of the conditions of a licence under section 7 of that Act to be served on the licensee), for “that person” there shall be substituted “every relevant licensee”. 5

(2) For subsection (4) of that section (circumstances in which a proposal by the Director General of Telecommunications for the modification of the conditions of a licence is made by agreement) there shall be substituted the following subsections— 10

“(4A) In the case of a licence granted to all persons, or to all persons of a particular class, the Director shall not make any modification unless—

- (a) he has considered every representation made to him about the modification; and 15
- (b) there has not been any objection by a person running a telecommunication system under the authority of the licence to the making of the modification.

(4B) In the case of a licence granted to a particular person, the Director shall not make any modification unless— 20

- (a) he has considered every representation made to him about the modification or any modification in the same or similar terms that he is at the same time proposing to make in the case of other licences; and 25
- (b) the requirements of section 12A below are satisfied in the case of the modification and also in the case of every such modification in the same or similar terms.”

(3) After subsection (6) of that section there shall be inserted the following subsections— 30

“(6A) Where the Director makes a modification under this section, he shall, as soon as reasonably practicable after making the modification, give notice of—

- (a) his reasons for doing so; and
- (b) where the modification is made by virtue of subsection (3) of section 12A below, his reasons for determining that the condition in paragraph (c) of that subsection is fulfilled. 35

(6B) Subsection (3) above shall apply in the case of a notice under subsection (6A) above as it applies in the case of a notice under subsection (2) above. 40

(6C) Where the Director has given notice under subsection (2) above of a proposal to modify the conditions of a licence, he may in such manner and at such time as he considers appropriate publish—

- (a) the identities of any or all of the persons who objected to the making of the modification; and 45
- (b) to the extent that confidentiality for representations or objections in relation to the proposal for the modification has

not been claimed by the persons making them, such other particulars of the representations or objections as he thinks fit.

(6D) In this section and section 12A below (except in subsection (6C) above), a reference to a representation or objection, in relation to a modification, is a reference only to a representation or objection which—

(a) was duly made to the Director within a time limit specified in the case of that modification under subsection (2)(c) above or section 12A(6)(e) below; and

(b) has not subsequently been withdrawn;
and for the purposes of this section and section 12A below representations against a modification shall be taken to constitute an objection only if they are accompanied by a written statement that they are to be so taken.

(6E) In this section and section 12A below ‘relevant licensee’, in relation to a modification, means—

(a) in a case where the same or a similar modification is being proposed at the same time in relation to different licences granted to different persons, each of the persons who, at the time when notice of the proposals is given, is authorised by one or more of those licences to run a telecommunication system; and

(b) in any other case, the person authorised by the licence in question to run such a system.

(6F) In this section references to making a modification of the conditions of a licence do not include references to the exercise of any power conferred by a term of the licence to revoke the licence in part or for particular purposes.”

(4) After that section there shall be inserted the following section—

“Agreement required for the purposes of section 12. 12A.—(1) The requirements of this section are satisfied in the case of a modification if any of subsections (2) to (5) below applies.

(2) This subsection applies if—

(a) it appears to the Director that the relevant licensee or, as the case may be, each of the relevant licensees has been given a reminder, at least seven days before the making of the modification, of the Director’s powers in the absence of objections; and

(b) there has not been an objection by a relevant licensee to the making of the modification.

(3) This subsection applies, in a case where there is more than one relevant licensee, if—

(a) the notice given under section 12(2) above in the case of the proposal for that modification contained a statement describing the method proposed by the Director for determining what would constitute objections from a significant minority of the relevant licensees;

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- (b) it appears to the Director that each of the relevant licensees has been given a reminder, at least seven days before the making of the modification, of the Director's powers in the absence of objections representing objections from a significant minority of the relevant licensees; and 5
 - (c) it appears to the Director that the objections made to him by relevant licensees, taken together, do not represent objections from at least a significant minority of the relevant licensees. 10
- (4) This subsection applies if—
 - (a) the modification is one which in the opinion of the Director is deregulatory; and
 - (b) the notice given under section 12(2) above in the case of the proposal for the modification contained a statement of that opinion and of the Director's reasons for it. 15
- (5) This subsection applies if—
 - (a) the modification is in the same or similar terms as modifications that the Director has already proposed but not yet made in the case of other licences; 20
 - (b) the licence in question is one issued since the making of the proposal for the modification of the conditions of the other licences; 25
 - (c) subsection (2), (3) or (4) above applies in the case of the modifications of the conditions of the other licences;
 - (d) it appears to the Director that the person holding the licence in question has been given a reasonable opportunity of stating whether he objects to the modification; and 30
 - (e) that person has not objected or is a person whose objection would not have prevented subsection (3) above from applying in the case of the other licensees if— 35
 - (i) his licence had been issued earlier; and
 - (ii) the proposal to modify the conditions of his licence had been made at the same time as the proposals for the other modifications. 40
- (6) A reminder for the purposes of subsection (2)(a) or (3)(b) above—
 - (a) must be contained in a notice given by the Director and, in the case of a relevant licensee which is a company with a registered office in the United Kingdom, must have been given to that company by being sent to that office; 45
 - (b) must remind the licensee of the contents of the notice which was copied to the licensee under

section 12(3) above in the case of the modification in question;

(c) must state that the Director will be able to make the modification if no relevant licensee objects;

(d) must also state, in the case of a reminder for the purposes of subsection (3)(b) above, that the Director will be able to make the modification if the objections from relevant licensees do not represent objections from a significant minority of the relevant licensees; and

(e) must specify a time (not being less than seven days from the date of the giving of the notice) at the end of which the final opportunity for the making of representations and objections will expire.

(7) Nothing in subsection (2) or (3) above shall require a reminder to be sent to a person who has consented to the making of the modification in question or who has already objected to it.

(8) For the purposes of this section it shall be the duty of the Director, in determining in relation to any modification whether it appears to him that the relevant licensees who have made objections represent at least a significant minority of the relevant licensees, to apply all such rules and principles as the Secretary of State may by order prescribe for the purposes of this section.

(9) The rules and principles prescribed under subsection (8) above shall include such rules and principles as appear to the Secretary of State appropriate for securing that due weight is given to both—

(a) the proportion of the total number of relevant licensees represented by the objecting licensees; and

(b) the size of the businesses and the nature and extent of the business activity of, respectively, the objecting licensees and the relevant licensees that do not object.

(10) The Secretary of State shall not make an order under subsection (8) above unless—

(a) he has (whether before or after the coming into force of this section) consulted about the terms of the order with the persons appearing to him to be likely to be affected by it; and

(b) a draft of the order has been laid before Parliament and approved by a resolution of each House.

(11) For the purposes of this section a modification is deregulatory if—

(a) the effect of the conditions to be modified is to impose a burden affecting the holder of the licence in which those conditions are included;

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- (b) the modification would remove or reduce the burden without removing any necessary protection;
- (c) the modification is such that no person holding a licence granted under section 7 above to a particular person would be unduly disadvantaged 5 by the modification in competing with the holder of the licence in which those conditions are included."

(5) In section 12 of that Act—

- (a) in subsection (2), the words after paragraph (c) (duty to consider 10 representations and objections) shall be omitted; and
- (b) in subsection (7) (references to modification not to include modifications relating to the telecommunications code), for "sections 13 to 15" there shall be substituted "sections 12A to 15".

(6) In section 104(1) of that Act (which provides with certain exceptions 15 for orders under that Act to be subject to the negative resolution procedure), after "section 2," there shall be inserted "12A(8)."

Appeals against
modifications
without the
licensee's consent.
[J301B]
1984 c. 12.

21. In the Telecommunications Act 1984, after the section 12A inserted by section 20 there shall be inserted the following section—

"Appeals against
modifications
under section 12.

12B.—(1) Where—

- (a) a condition of a licence granted to a particular person under section 7 above is modified under section 12 above, and
- (b) an objection to the making of the modification, or a representation against it, was made by the person 25 holding that licence,

an appeal shall lie to the High Court or, in Scotland, to the Court of Session against the decision of the Director to make the modification.

(2) The only grounds on which an appeal against such a 30 decision may be brought are—

- (a) that a material error as to the facts was relied on in the making of the decision;
- (b) that there has been some material procedural error in connection with the making of the decision; 35
- (c) that the decision involves a material error of law;
- (d) that the decision is one that could not reasonably have been arrived at.

(3) The leave of the court, given in accordance with rules of court, shall be required for the bringing of an appeal 40 under this section.

(4) The court shall not grant leave to bring an appeal under this section except to the holder of the licence.

(5) Rules of court may regulate the period within which an appeal may be brought under this section. 45

(6) On an appeal under this section the court's powers to dispose of the appeal shall be confined to power to do one or more of the following—

- (a) to dismiss the appeal;
- (b) to quash the decision appealed against;
- (c) to refer the matter back to be decided again;
- (d) to give directions as to how the subject-matter of the appeal should be decided on such a reference.

(7) An appeal under this section to the Court of Session shall be heard by the Lord Ordinary."

Supplemental

22. *There shall be paid out of money provided by Parliament—*

- (a) *any expenditure incurred by the Secretary of State for or in connection with the carrying out of his functions under this Act; and*
- (b) *any increase attributable to this Act in the sums which are payable out of money so provided under any other Act.*

Ministerial
expenditure etc.
[j503]

23.—(1) In this Act, except in so far as the context otherwise requires—

"document" includes a map, plan, design, drawing, picture or other image;

"electronic communication" means any communication (including one by means of which a payment is effected) which is transmitted from one person or device to another—

- (a) by means of a telecommunication system (within the meaning of the Telecommunications Act 1984); or
- (b) by other means but while in an electronic form;

"enactment" includes—

- (a) an enactment passed after the passing of this Act, and
- (b) an enactment contained in Northern Ireland legislation,

but does not include an enactment contained in any of Parts I to III of this Act;

"modification" includes any alteration, addition or omission, and cognate expressions shall be construed accordingly; and

"subordinate legislation" means any subordinate legislation (within the meaning of the Interpretation Act 1978) or any statutory rules (within the meaning of the Statutory Rules (Northern Ireland) Order 1979).

General
interpretation.
[j505]

1984 c. 12.

1978 c. 30.
S.I. 1979/1573
(N.I. 12).

(2) In this Act—

(a) references to the authenticity of any communication or data are references to whether the communication or data comes from a particular person or other source or is accurately timed and dated; and

(b) references to the integrity of any communication or data are references to whether there has been any tampering with or other modification of the communication or data.

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(3) References in this Act to something's being intelligible or being put into an intelligible form include references to its being in or, as the case may be, being restored to the condition in which it was before any encryption or similar process was applied to it.

Short title,
commencement,
extent. [j510]

24.—(1) This Act may be cited as the Electronic Communications Act 1999. 5

(2) Parts I and III of this Act and sections 7 and 20 shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint; and different days may be appointed under this subsection for different purposes. 10

(3) The day appointed under subsection (2) for the coming into force of so much of this Act as authorises the Secretary of State to grant permission for the purposes of Schedule 1 must be a day on which the Tribunal established under section 18 will have jurisdiction—

(a) by virtue of an order under that subsection, and 15

(b) in accordance with rules made and in force under paragraph 3 of Schedule 2,

to consider complaints relating to grants of permission made by the Secretary of State for those purposes.

(4) This Act extends to Northern Ireland. 20

(5) Her Majesty may by Order in Council direct that some or all of the preceding provisions of this Act are to extend, with such modifications as appear to Her Majesty to be appropriate, to any of the Channel Islands or to the Isle of Man.

SCHEDULES

SCHEDULE 1

Section 10.

PERSONS HAVING THE APPROPRIATE PERMISSION [J201S]

Data obtained under warrant etc.

- 5 1.—(1) This paragraph applies in the case of protected information falling within section 10(1)(a) or (b) where the statutory power in question is one exercised, or to be exercised, in accordance with—
- (a) a warrant issued by the Secretary of State or a person holding judicial office; or
 - 10 (b) an authorisation under Part III of the Police Act 1997 (authorisation of otherwise unlawful action in respect of property). 1997 c. 50.
- (2) Subject to sub-paragraphs (3) to (5) and paragraph 4, a person has the appropriate permission in relation to that protected information if—
- 15 (a) the warrant or, as the case may be, the authorisation contained the relevant authority's permission for the giving of section 10 notices in relation to protected information to be obtained under the warrant or authorisation; or
 - (b) since the issue of the warrant or authorisation, written permission has been granted by the relevant authority for the giving of such notices in relation to protected information obtained under the warrant or authorisation.
- 20 (3) Only persons holding office under the Crown, the police and customs and excise shall be capable of having the appropriate permission in relation to protected information obtained, or to be obtained, under a warrant issued by the Secretary of State.
- (4) Only a person who—
- 25 (a) was entitled to exercise the power conferred by the warrant, or
 - (b) is of the description of persons on whom the power conferred by the warrant was, or could have been, conferred,
- shall be capable of having the appropriate permission in relation to protected information obtained, or to be obtained, under a warrant issued by a person holding
- 30 judicial office.
- (5) Only the police and the customs and excise shall be capable of having the appropriate permission in relation to protected information obtained, or to be obtained, under an authorisation under Part III of the Police Act 1997.
- (6) In this paragraph “the relevant authority”—
- 35 (a) in relation to a warrant issued by the Secretary of State, means the Secretary of State;
 - (b) in relation to a warrant issued by a person holding judicial office, means any person holding any judicial office that would have entitled him to issue the warrant; and
 - 40 (c) in relation to protected information obtained under an authorisation under Part III of the Police Act 1997, means (subject to sub-paragraph (7)) an authorising officer within the meaning of section 93 of that Act.
- (7) Section 94 of the Police Act 1997 (power of other persons to grant authorisations in urgent cases) shall apply in relation to—
- 45 (a) an application for permission for the giving of section 10 notices in relation to protected information obtained, or to be obtained, under an authorisation under Part III of that Act, and
 - (b) the powers of any authorising officer (within the meaning of section 93 of that Act) to grant such a permission,
- 50 as it applies in relation to an application for an authorisation under section 93 of that Act and the powers of such an officer under that section.

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(8) References in this paragraph to a person holding judicial office are references to—

- (a) any judge of the Crown Court or of the High Court of Justiciary;
- (b) any sheriff;
- (c) any justice of the peace; or
- (d) any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge of the Crown Court or of a justice of the peace.

(9) Protected information that comes into a person's possession by means of the exercise of any statutory power which—

- (a) is exercisable without a warrant, but
- (b) is so exercisable in the course of, or in connection with, the exercise of another statutory power for which a warrant is required,

shall not be taken, by reason only of the warrant required for the exercise of the power mentioned in paragraph (b), to be information in the case of which this paragraph applies.

Data obtained under statute but without a warrant etc.

2.—(1) This paragraph applies—

- (a) in the case of protected information falling within section 10(1)(a) or (b) which is not information in the case of which paragraph 1 applies; and
- (b) in the case of protected information falling within section 10(1)(c).

(2) Subject to paragraph 4, where—

- (a) the statutory power was exercised by the police, the customs and excise or a member of Her Majesty's forces, or
- (b) the information was provided or disclosed to the police, the customs and excise or a member of Her Majesty's forces, or
- (c) the information is in the possession of the police, the customs and excise or a member of Her Majesty's forces,

the police, the customs and excise or, as the case may be, members of Her Majesty's forces have the appropriate permission in relation to the protected information.

(3) In any other case a person has the appropriate permission if—

- (a) he is a person falling within sub-paragraph (4); and
- (b) written permission for the giving of section 10 notices in relation to that information has been granted—
 - (i) in England and Wales, by a Circuit judge;
 - (ii) in Scotland, by the sheriff; or
 - (iii) in Northern Ireland, by a county court judge.

(4) A person falls within this sub-paragraph if, as the case may be—

- (a) he is the person who exercised the statutory power or is of the description of persons who would have been entitled to exercise it; or
- (b) he is the person to whom the protected information was provided or disclosed, or is of a description of person the provision or disclosure of the information to whom would have discharged the statutory duty.

Data obtained without the exercise of statutory powers

3.—(1) This paragraph applies in the case of protected information falling within section 10(1)(d).

(2) Subject to paragraph 4, a person has the appropriate permission in relation to that protected information if written permission for the giving of section 10 notices in relation to that information has been granted—

- (a) in the case of information which is in the possession of an intelligence agency, by the Secretary of State; and

(b) in the case of information which is in the possession of the police or the customs and excise—

(i) in England and Wales, by a Circuit judge;

(ii) in Scotland, by the sheriff; or

(iii) in Northern Ireland, by a county court judge.

(3) Where the protected information is in the possession both of an intelligence agency and of the police or the customs and excise, permission may be granted under sub-paragraph (2) either—

(a) by the Secretary of State, on the application of a person holding office under the Crown; or

(b) by a Circuit judge, the sheriff or a county court judge, on the application of the police or the customs and excise.

General requirements relating to the appropriate permission

4.—(1) A person does not have the appropriate permission in relation to any protected information unless he is either—

(a) a person who has the protected information in his possession or, in the case of information falling within section 10(1)(a) or (b), has it in his possession or is likely to acquire it; or

(b) a person who is authorised (apart from this Act) to act on behalf of such a person.

(2) Subject to sub-paragraph (3), a constable does not have the appropriate permission in relation to any protected information unless—

(a) he is of or above the rank of superintendent; or

(b) permission to give a section 10 notice in relation to that information has been granted by a person holding the rank of superintendent, or any higher rank.

(3) In the case of protected information that has come into the police's possession by means of the exercise of powers conferred by section 13A or 13B of the Prevention of Terrorism (Temporary Provisions) Act 1989 (powers to stop and search vehicles and pedestrians), the permission required by sub-paragraph (2) shall not be granted by any person below the rank mentioned in section 13A(1) of that Act.

1989 c. 4.

(4) A person commissioned by the Commissioners of Customs and Excise does not have the appropriate permission in relation to any protected information unless permission to give a section 10 notice in relation to that information has been granted—

(a) by those Commissioners themselves; or

(b) by an official of their department of or above such level as they may designate for the purposes of this sub-paragraph by order made by statutory instrument.

(5) A member of Her Majesty's forces does not have the appropriate permission in relation to any protected information unless—

(a) he is of or above the rank of lieutenant colonel or its equivalent; or

(b) permission to give a section 10 notice in relation to that information has been granted by a person holding the rank of lieutenant colonel or its equivalent, or by a person holding a rank higher than lieutenant colonel or its equivalent.

(6) A statutory instrument containing an order under sub-paragraph (4) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

SCH. 1

Duration of permission

5.—(1) A permission granted by any person under any provision of this Schedule shall not entitle any person to give a section 10 notice at any time after the permission has ceased to have effect.

(2) Such a permission, once granted, shall continue to have effect 5 (notwithstanding the cancellation, expiry or other discharge of any warrant or authorisation in which it is contained or to which it relates) until such time as it—

- (a) expires in accordance with any limitation on its duration that was contained in its terms; or
- (b) is withdrawn by the person who granted it or by a person holding any 10 office or other position that would have entitled him to grant it.

Formalities for permissions granted by the Secretary of State

6. A permission for the purposes of any provision of this Schedule shall not be granted by the Secretary of State except—

- (a) under his hand; or 15
- (b) in an urgent case in which the Secretary of State has expressly authorised the grant of the permission, under the hand of a member of the Senior Civil Service.

Section 18.

SCHEDULE 2

THE TRIBUNAL [J207S]

20

Constitution of Tribunal

1.—(1) The Tribunal shall consist of five members each of whom shall be—

1990 c. 41.

- (a) a person who has a ten year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990;
- (b) an advocate or solicitor in Scotland of at least ten years' standing; or 25
- (c) a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least ten years' standing.

(2) The members of the Tribunal—

- (a) shall be such persons as Her Majesty may by Letters Patent appoint; and
- (b) subject to the following sub-paragraphs, shall hold office during good 30 behaviour.

(3) A member of the Tribunal shall vacate office at the end of the period of five years beginning with the day of his appointment, but shall be eligible for reappointment.

(4) A member of the Tribunal may be relieved of office by Her Majesty at his own 35 request.

(5) A member of the Tribunal may be removed from office by Her Majesty on an Address presented to Her by both Houses of Parliament.

President and Vice-President

2.—(1) Her Majesty may by Letters Patent appoint as President or Vice- 40 President of the Tribunal a person who is, or by virtue of those Letters will be, a member of the Tribunal.

(2) If at any time the President of the Tribunal is temporarily unable to carry out the functions of the President under this Schedule, the Vice-President shall carry out those functions. 45

(3) A person shall cease to be President or Vice-President of the Tribunal if he ceases to be a member of the Tribunal.

SCH. 2

Rules of procedure of Tribunal etc.

3.—(1) The Secretary of State may make rules—

- (a) prescribing the form and manner in which a complaint is to be made;
- (b) concerning the determination of the question whether or not a complainant is an interested party (within the meaning of section 18);
- (c) enabling the functions of the Tribunal in relation to a complaint to be carried out, in any place in the United Kingdom, by any two or more members of the Tribunal designated for the purpose by their President;
- (d) enabling different members of the Tribunal to carry out functions in relation to different complaints at the same time;
- (e) prescribing the practice and procedure to be followed on or in connection with the hearing of a complaint, including the mode and burden of proof and admissibility of evidence on such hearings;
- (f) prescribing the orders that may be made by the Tribunal under section 18(3);
- (g) concerning any other matters preliminary or incidental to or arising out of the hearing of a complaint.

(2) Rules under this paragraph shall provide—

- (a) that a complainant has the right (subject to any power conferred on the Tribunal by such rules) to be legally represented in any proceedings before the Tribunal on the hearing of his complaint; and
- (b) that, subject to any rules under sub-paragraph (3), a complainant is to be notified of any decision of the Tribunal in respect of his complaint.

(3) Rules under this paragraph may, in particular, make provision—

- (a) enabling proceedings before the Tribunal to take place without the complainant being given full particulars of the reasons for any decision to which the complaint relates;
- (b) enabling the Tribunal to hold proceedings in the absence of any person, including the complainant and any legal representative appointed by him;
- (c) enabling the Tribunal to give the complainant a summary of any evidence taken in his absence.

(4) Rules under this paragraph may also include provision—

- (a) enabling functions of the Tribunal that relate to matters preliminary or incidental to the hearing of a complaint to be performed by a single member of the Tribunal;
- (b) conferring on the Tribunal such ancillary powers as the Secretary of State thinks necessary for the purposes of the exercise of their functions.

(5) In making rules under this paragraph the Secretary of State shall have regard, in particular, to—

- (a) the need to secure that matters which are the subject of complaints are properly considered; and
- (b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to—
 - (i) national security;
 - (ii) the prevention or detection of serious crime;
 - (iii) the economic well-being of the United Kingdom; or
 - (iv) the continued discharge of the functions of any intelligence agency.

SCH. 2

(6) In this paragraph “complaint” means a complaint falling within section 18(1)(a) or (b).

4.—(1) The power to make rules under paragraph 3 includes—

(a) power to make such incidental, supplemental, consequential and transitional provision as the Secretary of State thinks fit; and 5

(b) power to make different provision for different cases.

(2) The power to make rules under paragraph 3 shall be exercisable by statutory instrument.

(3) No rules shall be made under paragraph 3 unless a draft of them has first been laid before Parliament and approved by a resolution of each House. 10

5. Subject to rules under paragraph 3, the Tribunal may determine their own procedure.

Appointment of special representatives

6.—(1) The Attorney General, the Advocate General for Scotland and the Attorney General for Northern Ireland shall each have power to appoint a person to represent the interests of the complainant in any proceedings before the Tribunal from which the complainant and any legal representative of his are excluded in accordance with rules under paragraph 3. 15

(2) A person may be appointed under sub-paragraph (1) only if he is—

(a) a person having a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990; 20

(b) an advocate;

(c) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980 rights of audience in the Court of Session or the High Court of Justiciary; or 25

(d) a member of the Bar of Northern Ireland.

(3) A person appointed under sub-paragraph (1) shall not be responsible to the person whose interests he is appointed to represent.

Co-operation with Tribunal

7. It shall be the duty of— 30

(a) every person holding office under the Crown,

(b) every member of an intelligence agency,

(c) every official of a government department,

(d) every person engaged in the business of the Post Office or in the running of a public telecommunication system (within the meaning of the Telecommunications Act 1984), 35

1984 c. 12.

(e) every person by or to whom a section 10 notice has been given, and

(f) every officer or employee of a person whose officers or employees include persons with duties that involve the giving of section 10 notices,

to disclose or provide to the Tribunal such documents or information as they may require for the purpose of enabling them to carry out their functions under this Part. 40

Appeals on points of law

8.—(1) Where the Tribunal have made a final determination of any complaint, any party to the proceedings on the complaint may bring an appeal to the appropriate appeal court on any question of law material to that determination. 45

(2) An appeal under this section shall not be brought except with the leave of the Tribunal or, after such leave has been refused, with the leave of the appropriate appeal court.

(3) In this paragraph the “appropriate appeal court” means the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland according to the part of the United Kingdom to which the complaint is allocated in accordance with rules under paragraph 3 above.

SCH. 2

5

Salaries and expenses

9.—(1) *The Secretary of State shall pay to the members of the Tribunal out of money provided by Parliament such remuneration and allowances as he may with the approval of the Treasury determine.*

10 (2) *Such expenses of the Tribunal as the Secretary of State may with the approval of the Treasury determine shall be defrayed by him out of money provided by Parliament.*

Officers

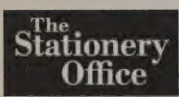
15 10.—(1) The Secretary of State may, after consultation with the Tribunal and with the approval of the Treasury as to numbers, provide the Tribunal with such officers as he thinks necessary for the proper discharge of their functions.

(2) The Tribunal may authorise any officer provided under this paragraph to obtain any documents or information on the Tribunal’s behalf.

Parliamentary disqualification

20 11. In Part II of Schedule 1 to the House of Commons Disqualification Act 1975 and 1975 c. 24.
in Part II of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975 1975 c. 25.
(bodies whose members are disqualified) there shall be inserted (at the appropriate places) the following entry—

“The Tribunal established under section 18 of the Electronic Communications Act 1999”.



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